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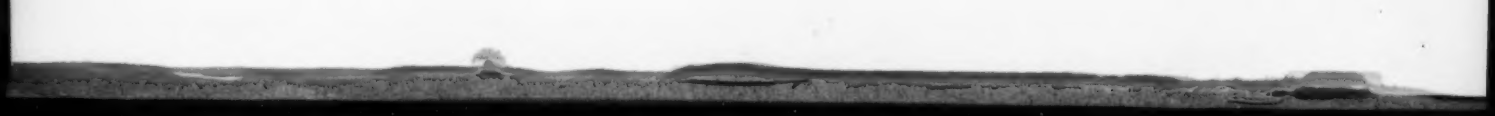

HOUSE . . . . No. 993

Ordered printed as a House document, on motion of Mr. Young of Weston. January 21.

The Commonwealth of Massachusetts.

Council Chamber, Boston, January 2, 1920.

To the Honorable the Justices of the Supreme Judicial Court:

Gentlemen: — At a meeting of the Governor and Council held on December 31, 1919, the following order was adopted, requesting the opinion of the Justices of the Supreme Judicial Court, viz.: —

Whereas, In connection with the issue and approval of bonds issued and to be issued by the Commonwealth of Massachusetts the question has arisen whether the title of Treasurer and Receiver General of the Commonwealth, as established by the Constitution of 1780 and the amendments thereof, has been changed, by the rearrangement hereinafter referred to, to "Treasurer of the Commonwealth";

And whereas, under article XI of chapter VI of the Constitution of Massachusetts, as adopted in 1780, it is provided:

"This form of government shall be enrolled on parchment, and deposited in the secretary's office, and be a part of the laws of the land; and printed copies thereof shall be prefixed to the book containing the laws of this commonwealth, in all future editions of the said laws."

And whereas, articles 157 and 158 of the Rearrangement of the Constitution of the Commonwealth, as adopted at the State election held on the 4th day of November last, provide as follows: —

"ART. 157. Upon the ratification and adoption by the people of this rearrangement of the existing constitution and the amendments thereto, the constitution shall be deemed and taken to be so rearranged and shall appear in such rearranged form in all future publications thereof. Such rearrangement shall not be deemed or taken to change the meaning or effect of any part of the constitution or its amendments as theretofore existing or operative.

"ART. 158. This form of government shall be enrolled on parchment, and deposited in the secretary's office, and be a part of the laws of the land; and printed copies thereof shall be prefixed to the book containing the laws of this commonwealth, in all future editions of such laws."

Ordered: That the opinion of the justices of the Supreme Judicial Court be required upon the following important question of law: —

Whether the Rearrangement of the Constitution of the Commonwealth submitted by the Constitutional Convention to the people for ratification and adoption at the State election held on the 4th day of November last — and at said election approved and ratified — is the "Constitution or Form of Government for the Commonwealth of Massachusetts."

Very respectfully,

[signed] CHARLES A. SOUTHWORTH,
Executive Secretary.

To His Excellency the Governor and the Honorable Council of the Commonwealth:

The substance of the important question of law in the order adopted by the Governor and Council on December 31, 1919, copy of which is hereto annexed, is: What is now the constitution of the Commonwealth? Is it the document entitled "Rearrangement of the Constitution," approved and ratified by a majority of those voting on the matter at the November election of nineteen hundred and nineteen, or is it the constitution adopted in seventeen hundred and eighty with the subsequent amendments?

It is customary, in ascertaining the meaning of any constitutional instrument, to scrutinize its history and consider the circumstances under which it came into existence. Its meaning must be sought primarily from the words used. It cannot be controlled by resort to other written records, or to the opinions of individual statesmen, legislators or publicists. In appropriate instances, other sources of information and enlightenment may be examined, such as reports of committees, utterances in their deliberative capacity of those presenting such reports and actions of conventions or legislatures. Courts and judges frequently refer in greater or less detail to the debates in assemblies undertaking to frame constitutions or amendments to constitutions in order to throw light upon provisions presented for interpretation. *Opinion of the Justices*, 126 Mass. 557, 561, 591–593, 598, 601. *Legal Tender Cases*, 110 U. S. 421, 443. *United States* v. *Trans-Missouri Freight Assn.* 166 U. S. 290, 317, 318. *United States* v. *Wong Kim Ark*, 169 U. S. 649, 697, 698, 699. *Orr* v. *Gilman*, 183 U. S. 278, 285. See *Legal Tender Cases*, 12 Wall. 457, 652–656 and *United States* v. *St. Paul, Minneapolis & Manitoba Railway*, 247 U. S. 310, 318.

The constitutional convention convened pursuant to St. 1916, c. 98, after somewhat protracted sessions in 1917 and 1918, and after having proposed three amendments balloted upon at the election of 1917 and after having voted to propose for the popular vote at the election of 1918 nineteen additional amendments to the constitution, provided for the

appointment of a "committee on Rearrangement of the Constitution." The duty of that committee as expressed in the order for its appointment was, "after the submission to the people of all the amendments proposed," to "arrange the Constitution, as amended, under appropriate titles and in proper parts, chapters, sections and articles, omitting all sections, articles, clauses and words not in force and making no substantive change in the provisions thereof." Accordingly a committee of nineteen members was appointed. Five were selected as a subcommittee to prepare the rearrangement. That subcommittee made a report in May, 1919, consisting of a draft of a proposed rearrangement. Article 159 of that draft corresponded to Article 157 quoted in the order of the Governor and Council. It was in these words:

"Art. 159. Upon the ratification and adoption of this constitution by the people, the constitution heretofore existing, with all amendments thereto, shall be deemed and taken to be revised, altered and amended accordingly. All laws not inconsistent with this constitution, and all rights, remedies, duties, obligations, and penalties, which exist and are in force when this constitution is ratified and adopted, shall continue to exist and be in force as heretofore until otherwise provided."

Without doubt the effect of that article, if validly adopted as a part of the fundamental law, would have been to create a new constitution and to substitute it for the pre-existing constitution with all its amendments. If so adopted the old constitution and amendments would have ceased to be the charter of government and the new constitution would have taken its place. We are not aware of any records of the proceedings of the committee of nineteen on rearrangement concerning this report of the subcommittee. It may have been felt that Article 159 as drafted went beyond the power conferred by the convention upon this committee which was simply to arrange the existing constitution and amendments and not to revise, codify or otherwise draft a new constitution. The one outstanding fact, however, is that the full committee having before it the article numbered 159 just quoted, unequivocally providing for a new constitution, rejected and refused to recommend that article but in its

stead framed and reported the very different Article 157 quoted in the order of the Governor and Council. The conclusion is irresistible that a radical change of meaning was intended by the rejection of that article numbered 159 and the insertion in its place of the present Article 157.

The committee on rearrangement of the constitution submitted to the convention the "Text of the Rearrangement," a "Report" and a "Memorandum" accompanying its report. In its "Report" are found these words:

"The object of the order [that is the order whereby provision was made for the rearrangement of the constitution] was, as the committee understands it, to have the existing constitution and its amendments, sixty-six in all, brought together in one body, omitting all 'sections, articles, clauses and words' which by the lapse of time, or by repeal, or annulment, or otherwise have ceased to be in force, and making such rearrangement, with the changes in phraseology and punctuation necessarily involved, as would form a consistent and connected whole. The committee are of opinion that it manifestly was not intended that they should draft a new constitution embodying the existing constitution and amendments, and they have not attempted to do so. They have considered that their duty in that regard was confined to one of rearrangement. The committee have construed the order to mean that it was the will and purpose of the convention that no change in the existing constitution and its amendments should be made by the committee which would or might in any way affect their meaning or present construction, or the construction which has heretofore been given to the provisions thereof, and they have carefully refrained from making any change which, it seemed to them would or might have that effect."

The "Memorandum" is a commentary explaining in some detail the several articles of the rearrangement; respecting the Article 157 quoted in the order of the Governor and Council, being Article 156 in the "Text of the Rearrangement," it is said:

"This is a new division and title. It adopts in part the language of the Act for calling and holding the convention (Acts of 1916, ch. 98), and is introduced to show that the proposed draft, if adopted, is to be regarded as a continuation of the existing constitution and amendments so far as the provisions thereof are in force, and that no substantive change in the present meaning and construction or that which has been heretofore given to them is intended."

When the convention met in the summer of 1919 to consider the report of the committee on rearrangement of the constitution and the text of the rearranged constitution Mr. Bryant of Milton, not having been a member of the committee of nineteen on rearrangement, put this searching and vital inquiry: "After we have adopted this, and after the people have voted on it, what is going to be the Constitution of Massachusetts? Where are we going to find it? Is it this document?" He stated his opinion to be that any question as to the meaning of the constitution could be resolved only by reference to the old constitution. He closed by expressing the hope that "the question will be answered for the purpose of the record, at least, after the people have adopted this, where shall we find the constitution of Massachusetts?" Mr. Parker, a former attorney general of the Commonwealth and a member of the subcommittee of five as well as of the committee of nineteen on rearrangement, at once answered that question. In the course of his remarks he said, referring to the document reported by the committee, "It is not, as we conceive it, a substituted Constitution, it is a rearranged constitution, preserving in its phrase all the provisions which are believed to be now operative. If some that are now operative are not in the new text they are still existing as the cardinal law of the Commonwealth." Although the records of the convention show that the other four members of the subcommittee on rearrangement were present and participated in the proceedings touching other matters, none of them essayed to reply further to the question of Mr. Bryant or to amplify, qualify or refute the answer made by their colleague, Mr. Parker. The inference from the form of his statement just quoted and from all the circumstances is that he spoke for the committee. There was no other discussion in the convention touching this subject except that another member subsequently asked substantially the same question as that propounded by Mr. Bryant but no further reply was made.

When the convention in 1917 and in 1918 submitted certain proposed amendments of the constitution to popular vote, it provided that in case of an affirmative vote the

governor of the Commonwealth should make proclamation of their adoption. It made no such provision in the event of an affirmative vote by the people upon the rearrangement of the constitution.

The fair inference from these facts concerning the rearrangement of the constitution and of Article 157 of that rearrangement is that the convention in authorizing the appointment of the committee to make the rearrangement, the committee in making the rearrangement and the convention in finally adopting it did not have the remotest intention of changing in the smallest particular the meaning, scope or effect of the then existing constitution and its amendments. That is manifest from a mere reading of the votes and reports already quoted. The reasons for that attitude may have been numerous. It may have been because of a determination not to risk disturbance of that which had been settled. The convention had proposed for the vote of the people twenty-two amendments to the constitution. Most of these were the subject of full discussion and gave rise to considerable contrariety of view among the members. The one relative to the Initiative and Referendum was very long when compared with any provision of the constitution or previous amendment. The precise phrase of each amendment was important and had been given painstaking consideration. A fixed purpose that the fruits of such labor and care should not be lost through any accident of revision of the text would not be unnatural. Many provisions of the constitution of 1780 and of its amendments have been interpreted and construed by the executive, legislative and judicial departments of government. It may have been thought not wise to unsettle by any possibility this body of constitutional law which has been stabilized by its slow growth.

The approval and the ratification of the rearrangement of the constitution by the majority of those voting on the subject at the last election do not affect the question proposed in the order of the Governor and Council. That approval and ratification were directed as much to Article 157 as to any other part.

In the light of these circumstances the meaning of section 157 quoted in the order of the Governor and Council must be ascertained. The first sentence of that section is in these words: "Upon the ratification and adoption by the people of this rearrangement of the existing constitution and the amendments thereto, the constitution shall be deemed and taken to be so rearranged, and shall appear in such rearranged form in all future publications thereof." The words "rearrangement" and "rearranged" do not express revision, codification or the establishment of something new. They are inapt to describe a finality. Nevertheless if the first clause of this sentence stood alone there would be strong implication as matter of construction that "this rearrangement of the existing constitution and the amendments thereto" when validly adopted by the people, would be the constitution. The shadow thrown upon that construction by the words "rearrangement" and "rearranged" is deepened by the concluding clause, namely, "and shall appear in such rearranged form in all future publications thereof." This clause would be wholly superfluous if "this rearrangement" were itself to be the constitution. If the rearrangement were to be the constitution, it would not be a "rearranged form": it would be itself the entire substance and not a "form," rearranged or otherwise. Moreover if the rearrangement were the constitution, manifestly it alone could appear "in all future publications thereof." No other document or instrument could be thought or deemed to be the constitution, or susceptible of being published as such. Declaration to that end would be vain especially in view of the provisions of the following Article 158, also quoted in the order of the Governor and Council. The last word of the first sentence, namely "thereof," under these circumstances seems to refer to the words "the existing constitution and the amendments thereto." The second sentence of Article 157 is in these words: "Such rearrangement shall not be deemed or taken to change the meaning or effect of any part of the constitution or its amendments as theretofore existing or operative." That sentence is something different from the formulation of a mere rule of construction. A rule of that nature is at hand

in the simple words usually found in general revisions of statutes to the effect that their provisions "so far as they are the same as those of existing statutes, shall be construed as a continuation thereof." R. L. c. 226, § 2. Such a rule of construction recognizes the new as controlling. The second sentence of Article 157 is widely at variance with the thought thus embodied. This sentence signifies that the old constitution and its amendments shall not be changed in meaning or effect in any part by the rearrangement. The words of this sentence cannot be given force according to the common and approved usage of the language except by holding that in case of any conflict between the provisions of the rearrangement and the constitution with its amendments, the latter must prevail and those of the rearrangement must yield. Doubtless it was intended that there should be no change made by the rearrangement. But the deeper question is in case there is a substantial change, which governs? The second sentence of Article 157 seems to us to declare that in such case "the constitution" of 1780 with "its amendments" shall stand in preference to the "rearrangement." That interpretation is not affected by the concluding words of the sentence "as theretofore existing or operative." Whether these are taken as modifying the words "meaning and effect" or the words "constitution and its amendments" they do not shake or obscure the dominant thought expressed by the sentence. That dominant thought is the continued primacy of "the constitution and its amendments" notwithstanding anything contained in the "rearrangement." It is unthinkable that it was intended that there should be at one and the same time two different and separate constitutions. That would be a contradiction of terms. Either the rearrangement or the constitution of 1780 with its amendments must be the constitution. They cannot both be concurrently effective as constitutions. A written constitution is the fundamental law for the government of a sovereign state. It is the final statement of the rights, privileges and obligations of the citizens and the ultimate grant of the powers and the conclusive definition of the limitations of the departments of state and of public officers.

In its grants of powers, the bounds set for their exercise, the duties enforced and the guarantees established are found the constitutional liberty of the individual and the foundation for the regulated order and general welfare of the community. To its provisions the conduct of all governmental affairs must conform. From its terms there is no appeal. Such a great charter cannot itself in the nature of things be made subject in its "meaning and effect" to another instrument. In that event it is not final and that other instrument becomes paramount. Article 157 in its entirety is language apparently not designed to declare the rearrangement as the final law. Its meaning and effect are by the express words of that article made dependent upon the terms of the constitution and its amendments. Therefore the rearrangement cannot be itself the fundamental law. It is a rearrangement of the old, it is not the creation of a new form of government.

The rearrangement of the constitution is an important instrument. It purports to present in unified form and in logical sequence the existing and operative provisions of the constitution. It possesses all the sanctions naturally flowing from the circumstances attendant upon its origin, composition, adoption, approval and ratification. Doubtless its convenience and accessibility are its abundant justification.

We therefore answer that in our opinion the "Rearrangement of the Constitution" described in the order of the Governor and Council is not "The Constitution or Form of Government for the Commonwealth of Massachusetts."

ARTHUR P. RUGG.
HENRY K. BRALEY.
CHARLES A. De COURCY.
JOHN C. CROSBY.
EDWARD P. PIERCE.
JAMES B. CARROLL.
CHARLES F. JENNEY.

SENATE . . . . No. 243

To accompany the petition of Augustus P. Loring that the Constitution of 1780 be repealed and that the rearrangement of the same adopted by the people November 4, 1919, be adopted as the Constitution of the Commonwealth. Constitutional Amendments.

The Commonwealth of Massachusetts.

In the Year One Thousand Nine Hundred and Twenty.

RESOLVE

To provide that the Rearrangement of the Constitution Adopted by the Voters in November, Nineteen Hundred and Nineteen, shall be the Constitution of the Commonwealth.

Resolved, By the senate and house of representatives, in joint session, that it is expedient to alter the constitution by the adoption of the following articles of amendment to the end that they may become a part of the constitution, if similarly agreed to in a joint session of the next general court and approved by the people at the state election next following.

ARTICLES OF AMENDMENT.

The constitution or form of government of the commonwealth of Massachusetts, adopted in seventeen hundred and eighty, and the sixty-six articles of amendment

thereto, is hereby deemed and taken to be revised, altered and amended by the rearrangement of the constitution adopted by the voters at the state election in November, nineteen hundred and nineteen, which is hereby declared to be the constitution of the commonwealth of Massachusetts, with article one hundred and fifty-seven thereof changed so as to read as follows: — *Article 157.* Upon the ratification and adoption by the people of this rearrangement of the constitution of seventeen hundred and eighty, and the amendments thereto, as the constitution of the commonwealth, the constitution shall be deemed and taken to have been adopted as so rearranged and shall so appear in all future publications thereof. The provisions of this constitution shall, in all cases, be construed as continuations of the corresponding provisions of the constitution hereby superseded, and not as new provisions, and without affecting the meaning or judicial construction heretofore given thereto. All laws not inconsistent with this constitution and all rights, remedies, duties, obligations and penalties existing and in force when this constitution is ratified and adopted shall continue to exist and be in force as heretofore until otherwise provided.

HOUSE No. 597

REPORT

OF

THE COMMISSION

APPOINTED TO INVESTIGATE

THE JUDICATURE OF THE COMMONWEALTH

UNDER CHAPTER 223, GENERAL ACTS OF 1919

JANUARY, 1920

BOSTON
WRIGHT & POTTER PRINTING CO., STATE PRINTERS
32 DERNE STREET
1920

The Commonwealth of Massachusetts.

JAN. 5, 1920.

To the Honorable Senate and House of Representatives.

In accordance with the provisions of chapter 223 of the General Acts of 1919 we have the honor to transmit the following report of the Judicature Commission.

Very respectfully,

HENRY N. SHELDON.
GEO. R. NUTTER.
ADDISON L. GREEN.

The Commonwealth of Massachusetts.

General Acts, Chapter 223.

An Act to provide for a Commission to investigate the Judicature of the Commonwealth.

Be it enacted, etc., as follows:

Section 1. The governor, with the advice and consent of the council, shall appoint a commission of three persons to investigate the judicature of the commonwealth with a view to ascertaining whether any and what changes in the organization, rules and methods of procedure and practice of the several courts, the number and jurisdiction thereof, and the number and powers of the judges therein, and of the officers connected therewith, would insure a more prompt, economical, and just dispatch of judicial business. The commission shall be known as the "judicature commission", and shall report its conclusions to the general court, on or before the first Wednesday in January, nineteen hundred and twenty, with drafts of any legislation which it may deem expedient. The commission shall report to the governor, when so requested, as to the progress of its work.

Section 2. The commission may give public hearings, shall have power to administer oaths and to require the attendance of witnesses and the production of books and documents, and may cause a stenographic report of the proceedings before it to be made. A witness who gives false testimony or who fails to appear when duly summoned shall be subject to the same penalties to which a witness before a court is subject.

Section 3. No member of said commission shall receive any compensation for his services, but the commission and the several members thereof shall be allowed from the state treasury such expenses for clerical and other services, travel and incidentals, as the governor and council shall approve, not exceeding such sum as the general court may appropriate. The commission may avail itself of the services of the department of the supervisor of administration. [*Approved June 10, 1919.*

REPORT OF THE JUDICATURE COMMISSION.

To the Honorable Senate and House of Representatives.

During the past ten years there has been a great development all over the country in the study of the administration of justice as distinguished from substantive law. Bar association reports, law magazines and other publications have been filled with discussions of the subject, and many leading lawyers in the country have contributed to these discussions.

A bill for the creation of a Judicature Commission to study the judicial system was introduced several times some years ago by the late Senator Charles E. Burbank, subsequently Supervisor of Administration, and the idea of such a commission was favorably considered by the joint committee on the judiciary. In 1919 the present Supervisor of Administration and others again brought the matter before the Legislature, and the Commission was finally created by chapter 223 of the General Acts of 1919 which appears on the foregoing page. Under this act the Governor appointed the undersigned as commissioners.

The original appointments for membership in the Commission were: Henry N. Sheldon, Roscoe Pound and John W. Cummings. During the summer Dean Pound and Mr. Cummings found that it was impossible for them, in view of the other demands upon their time and strength, to accept the appointment.

Thereafter the undersigned, George R. Nutter and Addison L. Green, were appointed in their places. Owing to this unavoidable delay in the appointment of the Commission, it was unable to organize until early in October. Then the Commission selected Frank W. Grinnell of Boston as its secretary, and began upon the study of the very broad field of inquiry described in the act. After various preliminary conferences, the following circular was prepared: —

JUDICATURE COMMISSION,
249 STATE HOUSE, BOSTON.

To the Members of the Massachusetts Bar.

The undersigned commissioners have been appointed by the Governor, under chapter 223 of the General Acts of 1919 —

To investigate the judicature of the commonwealth with a view to ascertaining whether any and what changes in the organization, rules and methods of procedure and practice of the several courts, the number and jurisdiction thereof and the number and powers of the judges therein, and of the officers connected therewith, would insure a more prompt, economical, and just dispatch of judicial business.

The first public hearing will be held in Room 249, State House, Boston, on Wednesday, Nov. 12, 1919, at 10 A.M., and will be continued thereafter if found necessary. Hearings in Springfield and Worcester will be announced later, and other hearings will be held if it seems advisable.

The Commission invites suggestions as to any matters which it is called upon to consider, either by communication in writing or by appearance at any of the public hearings. It will be of assistance if those who wish to be heard at the hearings will notify the secretary as soon as possible.

Written communications should be directed to the Judicature Commission, Room 249, State House, Boston, Mass.

HENRY N. SHELDON,
GEORGE R. NUTTER,
ADDISON L. GREEN,
Commissioners.

F. W. GRINNELL, *Secretary.*

Copies were mailed to all the judges in the State, to the clerks of court, registers of probate, sheriffs in the various counties, and to about 1,200 or more members of the bar in different parts of the State. The notice was also published in the leading Boston papers, some of which called attention to it in their news or editorial columns.

In accordance with the notice, the Commission held a public hearing in Room 249, State House, on Wednesday, November 12, and continued the hearing in the same place on Thursday, November 13.

Thereafter a similar notice of another hearing to be held in the Court House in Springfield on Thursday, November 20, was published in papers in Springfield, Pittsfield, North Adams, Northampton, Westfield and Holyoke. In accordance with the notice, a public hearing was held in Springfield at the time specified.

The Commissioners have also held special conferences with men whose experience or special study of different matters seemed likely to furnish assistance in the inquiry, and it expects to hold more of such conferences and hopes to receive more suggestions. Other public hearings may be arranged later.

In addition to this, a notice to members of the bar, inviting suggestions, was published in the "Massachusetts Law Quarterly," and a special notice was sent out by the Massachusetts Bar Association, announcing that an opportunity for suggestions and discussions relative to the inquiry would be given at the annual meeting of that association in Worcester on Friday, Dec. 5, 1919. At that meeting a number of members of the bar addressed the Commission specially on the subject of masters and auditors.

The Commission has received many suggestions, orally and in writing, relating to every part of the judicial system, which are so varied and which raise so many practical questions requiring careful consideration and judgment, that it has been impossible to consider them adequately and report upon them, in such a way as to assist the Legislature, within the short time remaining between the organization of the Commission and the first Wednesday in January, which is the date specified in the act for a report. One member of the Commission was ill and confined to the house for about a month in November and December.

In order to consider with any degree of care the various suggestions and discussions, and to report to the Legislature what, in the judgment of the Commissioners, seems of practical value for this State, it is essential that further time should be given in which to study, to discuss with members of the bench and bar and others, and to formulate recommendations in as simple and practical a manner as possible.

The Commission requests, therefore, that the time for its final report be extended until Jan. 1, 1921, with the understanding that the Commission may make separate reports on different subjects in the meantime if it is prepared to do so and feels that such separate reports would be of assistance to the Legislature.

Informal Procedure for Small Claims.

There is one subject on which the Commission is prepared to report, namely, the provisions for the informal hearing and prompt disposition of small claims under $35 in the police, district and municipal courts.

This subject has been brought before the Commission and the public with peculiar force by the recent publication of a scientific study entitled "Justice and the Poor," by Reginald H. Smith, Esq., formerly counsel for the Boston Legal Aid Society. This report is the result, not only of Mr. Smith's experience, which covered a period of five years in dealing directly or through his subordinates with some 15,000 matters in the legal aid office in Boston, but also of a practical study conducted by him in all the cities in the country where legal aid societies and experiments in the procedure relating to small claims are conducted. This book is supplemented by other accounts relating to this matter in the publications of the American Judicature Society and elsewhere.

In addition to the printed evidence, the Commission has also had the advantage of conferences with judges and members of the bar in different parts of the State.

While all this evidence in regard to the matter is important and valuable as to experiments and their results in other parts of the country where they have taken the initiative in this respect, the Commission feels that the strongest evidence is to be found in the consideration of the matter as a question of practical common sense, which has been overlooked generally in this and other States until it was brought clearly to the front by the successful experiments in Cleveland and elsewhere, which are explained in detail in the publications above referred to.

The substantial point which the Commission believes to be established by all this evidence is that, as a practical matter in many cases involving small amounts, the delay incident to formal court procedure, the expense involved in the service of process and in the present entry fee, and the expense of an attorney result in a failure of justice simply because the parties have not the money to pay what is required in the litigation of these matters.

This is not a healthy state of affairs in any community. That the failure of justice in this way may be relatively less in Massachusetts than that in some other places is no reason why efforts should not be made to improve matters in Massachusetts. Is it fair that a man who has a small claim for $5 or $10 or thereabouts should be under the necessity of paying out as much or more than the amount of his claim in order to present the matter to the court?

The Commission realizes fully the worth of the work of the legal aid societies, of the many charitable and other organizations throughout the State, and of the generous and unpaid services of individual lawyers in various cities and towns scattered over the State, in helping people to secure the protection of their rights in small causes. But, when due allowance is made for all this sort of generous work, the protection and enforcement of legal rights ought not to be left to charity, and the fact remains that the judicial machinery fails to provide a fair opportunity in many small cases.

Cannot Massachusetts devise some practicable method of handling these small claims promptly, simply, informally and without unnecessary existing expenses, in the interests of justice?

The Commission believes that a practicable plan can be devised for this purpose, and that it can be as successfully administered in Massachusetts as it appears to be administered elsewhere.

Accordingly, the Commission recommends that special provision be made for dealing with such small claims in all the police, district and municipal courts of the State, and it submits a draft of legislation for this purpose.

While the occasion for such procedure may be more marked in the larger cities, yet there seems to be no reason for confining it to cities, and we believe that Massachusetts should take the lead in passing a State-wide act of this character. No complicated legislation is needed. All that is necessary is to make it clear that the police, district and municipal courts shall by rule provide that persons having claims under a certain amount may bring them directly before the judge, simply, without expense, and without formality, and let the judge dis-

pose of the matter then and there, as courts of this nature are doing successfully in other jurisdictions in thousands of cases to-day.

The question of the amount at which to fix the limit of the jurisdiction has been a matter of discussion. This amount varies in different places in other jurisdictions. The Commission suggests that it should be fixed at $35. Most claims under that amount, while of considerable importance to persons who have them, are not claims which call for any formal procedure, but they do call for the administration of practical, speedy justice, with the least possible red tape and expense that can be devised, in order that the persons involved shall not only get, but shall understand that they get, a fair hearing.

The proposed bill does not necessarily exclude lawyers. It does not prevent a judge from transferring the case to the regular docket for more formal hearing if there seems special occasion for it, but it does give an opportunity to the parties to come directly before the judge, tell him their story, answer his questions, and let him settle it, and that is what most people in such small matters want. The bill does not affect the right of jury trial, as any one who wishes to claim a jury trial is given an opportunity for removal.

Explanation of the Proposed Act by Sections.

Section 1.

Section 45 of chapter 160 of the Revised Laws makes the justices or a majority of them of the several police, district and municipal courts, other than the Municipal Court of the City of Boston, the practical rule-making power for those courts. Accordingly, they are made the rule-making power in this act. The association of justices of these courts which now exists would undoubtedly give the matter prompt attention.

In regard to the Municipal Court of the City of Boston a separate provision is made so that the rules for that court will be in the hands of the present rule-making power for that court.

It is specifically stated that the procedure thus provided shall not be compulsory, but shall be an alternative procedure for

small claims for debt or damages not exceeding $35. The reason for this is that many people who do not fully understand a new plan object to being forced into it, whereas if it is simply made an alternative plan, those people who wish to avail themselves of it may do so, and the needs of the people in the communities of the several courts will decide which procedure is the better adapted to those needs. This alternative plan does not hurt anybody, and is the best method of introducing in Massachusetts this new machinery.

Certain details in regard to the procedure are specified in the act as necessary, in the judgment of the Commission, to accomplish the object. The other details are left to be adjusted by the rules.

A brief picture of the proceedings in the Cleveland court may help the Legislature to understand the nature of the plan as the Commission sees it. There a plaintiff having a claim of $10 goes to the clerk of the court, tells his story and presents his bill. The clerk sometimes calls up the defendant on the telephone and tells him of the claim. If the defendant pays it, the matter stops there. If the defendant does not pay, the clerk writes out, as briefly as possible on the docket kept for that purpose, the substance of the plaintiff's bill or of the plaintiff's claim. He then gives the plaintiff a slip of paper stating the time, three or more days later (as may be determined by rule), when the case will be heard by the judge and the room in the court house where the plaintiff is to appear with his witnesses if he has any. The clerk then makes a copy of the statement of the claim as entered on the docket in a notice to the defendant with a statement of the time and place for hearing before the judge. This notice is then mailed either by the clerk or by the court officer by ordinary mail, the 2-cent stamp being provided by the plaintiff.

Of course registered mail can be required and may be advisable to begin with, but in the Cleveland court we understand they began their experiment by registered mail, and later adopted the ordinary mail service because the defendant in fact received the notice more promptly, and they had no practical difficulty in the matter of defaults for insufficient service. An envelope stamped "Return if not delivered within 3 days"

may be found sufficient. The Commission feels that the form of mail service should be left to be decided by the rules.

There is no entry fee. The only cost other than necessary postage will be the cost of summoning witnesses, but in most of these cases the only witnesses are the parties themselves or those whom they bring with them without summons. If a party wishes to summon a witness, of course he may do so in the ordinary way.

On the day specified for hearing, the parties appear before the judge. Each one can bring a lawyer if he wants to, but, as a practical matter, in these small cases under simple procedure lawyers are generally unnecessary. The parties go directly before the judge, tell their story and answer his questions, and he delivers judgment on the case thus presented in accorddance with the rules of substantive law. In considering this whole matter it should be noticed that it is specifically stated that the judge is to decide in accordance with the rules of substantive law, and that the only rules that are relaxed in the proposed plan are those of a technical character regulating the mode of trial.

Accordingly, no further pleadings are needed other than brief entries on the docket, unless the court sees fit to call for something else because of special circumstances, and the extent to which rules of practice shall be applied may well be left to the discretion of the courts. The judge is dealing directly with parties who are not lawyers and do not understand the rules of evidence. The judge can sift the evidence. He is left free to get at the facts. When he gets them he applies the law and decides the case.

The provision in the proposed act for a stay of the entry of judgment or the issue of the execution will enable the judge to decide how and when the judgment shall be paid in the simplest manner without formal proceedings. This resembles the provision of the soldiers and sailors civil relief act, and enables the court to adapt the order to the facts as justice may require.

The provision that the rules may provide for the imposition of costs in the discretion of the court is inserted to enable the judges to meet any attempt to abuse the use of the proposed procedure in unforeseen ways.

The provision that the court may issue writs of attachment on application protects the plaintiff in that respect if he wishes to make an attachment and to go to the expense of serving it in the ordinary way.

The reason for limiting the act to claims of contract or tort for debt or damages is simplicity in introducing this new procedure. It has been suggested to the Commission that the act should also cover small cases of replevin and ejectment, and after experience with the new plan it may be advisable to extend it to cover such cases. Claims of slander and libel are expressly excluded, as such claims are of peculiar nature. They are apt to arise from unbridled tongues and irritated moods, which subside if not treated too seriously. The existing procedure affords sufficient protection in cases serious enough to warrant suit, and there is no occasion for inviting others. Such cases might seriously clog the small claims docket with neighborhood rows and obstruct the real purpose of the act.

Section 2.

This section protects the defendant's right of jury trial by an automatic system of removal upon claim of jury trial, which is taken from the existing provision already approved by the Legislature in the act of 1912 and its amendments relating to the Municipal Court of the City of Boston. The plaintiff, of course, waives the right of jury trial and also the right of appeal (either to the Superior Court or, in the Municipal Court of the City of Boston, to the Appellate Division) in these small cases by choosing to begin his suit under this procedure. To attempt to combine juries and appeals with small claims procedure would defeat the purpose of the act. If the plaintiff wishes to preserve the right of appeal, he can begin his suit by writ in the ordinary way. But if he wishes to have a day in court and get through with the matter as soon as possible he may use the informal procedure, whereby he offers to the defendant a simple, inexpensive and conclusive hearing. Then it is open to the defendant either to reject that offer by removing the case, or to accept it by going to hearing under the informal procedure.

In case of removal the original papers, if any, or the original

docket entry, if the docket is kept on a loose-leaf system, or attested copies thereof, will be transmitted to the Superior Court. The question of the form of the docket and whether originals or attested copies shall be transmitted is left to be decided by the rules. When the case arrives in the Superior Court it may be tried on the original record, or the Superior Court may direct the filing of formal pleadings.

Section 3.

This merely introduces the existing provision of the Boston Municipal Court act relating to cases where there are several parties.

Section 4.

This enables the judge to transfer the case to the regular civil docket for formal hearing in cases where special circumstances render that advisable, as in the case of some unusual question of law or peculiarity of the facts. The provision allowing the judge to impose terms on such transfer will enable him to control attempts to abuse the process, as, for instance, the bringing of cases by small claims process for the purpose of avoiding an entry fee when the plaintiff knows that such cases are of a nature which requires a formal hearing and the presence of counsel. There may be cases which, because of peculiarity, cannot be readily tried under this procedure without interrupting and clogging the docket and obstructing the purpose for which the procedure is created. Accordingly, the court should have some control in this matter.

Section 5.

The provision limiting costs to be recovered by the plaintiff in cases brought by writ which might have been begun under the informal procedure is for the protection of defendants who under the existing inflexible statutes as to costs may be subjected to bills of costs far exceeding the amount of the claims.

The plan thus outlined and provided for in the act is, in the judgment of the Commission, a simple, practicable plan applicable to the existing courts both in cities and in towns. The

Commission believes it will be a valuable addition to any system of administering justice, and, if adopted, understands it will be the first State-wide act of its kind in the country. Massachusetts has the opportunity of taking the lead in adopting such a State-wide act.

Respectful y submitted,

HENRY N. SHELDON.
GEO. R. NUTTER.
ADDISON L. GREEN.

LEGISLATION RECOMMENDED

An Act to establish a Simple, Informal and Inexpensive Procedure for the Hearing and Determination of Small Claims.

Be it enacted, etc., as follows:

Section 1. The justices or a majority of them of all the police, district and municipal courts, except the municipal court of the city of Boston, shall make uniform rules applicable to said courts, and the justices of the municipal court of the city of Boston or a majority of them shall make rules applicable to that court, providing for a simple, informal, and inexpensive procedure for the determination, according to the rules of substantive law, of claims in the nature of contract or tort other than slander and libel in which the plaintiff does not claim as debt or damages more than thirty-five dollars. Such procedure shall not be exclusive, but shall be alternative to the formal procedure for causes begun by writ. Such procedure shall include the beginning of actions without entry fee or writ, or requirement, except by special order of court, of other pleading than a statement to a clerk or an assistant clerk of the court, who shall reduce the same to concise written form in a docket kept for the purpose. Such procedure shall include notice by mail instead of the mode of legal service heretofore required, and shall further include provisions for early hearing of actions thus begun. Such procedure may include the modification of any or all existing rules of pleading and practice, and a stay of the entry of judgment or of the issue of execution. The rules for such procedure may provide for the elimination of any or all fees and costs now fixed by law, and that the imposition of costs in causes under such procedure shall be in the discretion of the court. In causes begun under such procedure the court may on application for cause shown issue writs of attachment of property or person as in causes begun by writ.

Section 2. A plaintiff beginning a cause under such procedure shall be deemed to have waived a trial by jury and his right of appeal to the superior court, unless said cause shall be removed to the superior court as hereinafter provided, in which case the plaintiff shall have the same right to claim a trial by

jury as if said cause had been originally begun in the superior court. No other party to a cause under such procedure shall be entitled to an appeal. In lieu thereof, any such party may, prior to the day upon which he shall be notified to appear, file in the court in which such cause is pending a claim of trial by jury, and his affidavit that there are questions of fact requiring trial in the cause with specifications of the same, and that such trial is in good faith intended, together with the sum of three dollars for the entry of the cause in the superior court. The clerk shall forthwith transmit such original papers or attested copies thereof as the rules made under section one of this act may provide, and the superior court may try the cause as transmitted or may require pleadings as in a cause begun by writ, but said cause may be marked for trial on the list of causes advanced for speedy trial by jury.

SECTION 3. The provisions of section four of chapter six hundred and forty-nine of the acts of nineteen hundred and twelve shall apply to all police, district and municipal courts in causes begun under this act.

SECTION 4. The court may, in its discretion, transfer a cause begun under this act to the regular civil docket for formal hearing and determination as though begun by writ, and may impose terms upon such transfer.

SECTION 5. In any cause begun by writ which might have been begun under the informal procedure herein provided for, the rules may provide, or the court may by special order direct, that the costs to be recovered by the plaintiff if he shall prevail, be eliminated in whole or in part.

SECTION 6. This act shall take effect on

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OF THE

MASSACHUSETTS BAR ASSOCIATION

FOR 1919–1920.

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Boston.

Vice-Presidents.

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Fall River.

JOHN W. HAMMOND,
Cambridge.

FREDERIC DODGE,
Belmont.

WILLIAM CALEB LORING,
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CHARLES B. RUGG,
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Edmund K. Arnold,	Boston.	John W. McAnarney,	Quincy.
John Barker,	Pittsfield.	William G. McKechnie,	Springfield.
Stoughton Bell,	Cambridge.	John W. Mason,	Northampton.
Charles M. Davenport,	Boston.	Charles Mitchell,	New Bedford.
Arthur W. Dolan,	Boston.	Starr Parsons,	Lynn.
Edmond J. Ford,	Lawrence.	Stanley E. Qua,	Lowell.
Henry H. Fuller,	Lancaster.	Reginald H. Smith,	Boston.
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Robert D. Weston, Cambridge.

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FRANCIS G. GOODALE,	Weston.	GUY NEWHALL,	Lynn.
JOHN T. HUGHES,	Boston.	FITZ HENRY SMITH,	Boston.
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MALCOLM DONALD,	Milton.	PHILIP RUBENSTEIN,	Boston.
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Committee on Publication of the Massachusetts Law Quarterly.

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Special Committee on Uniform Laws.

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EDMUND K. ARNOLD. | GEORGE P. DRURY.
THE SECRETARY.

List of Past Presidents of the Association.

RICHARD OLNEY, of Boston, 1909–1910.
ALFRED HEMENWAY, of Boston, 1910–1911.
CHARLES W. CLIFFORD, of New Bedford, 1911–1912.
JOHN C. HAMMOND, of Northampton, 1912–1913.
MOORFIELD STOREY, of Boston, 1913–1914.
HERBERT PARKER, of Lancaster, 1914–1915.
HENRY N. SHELDON, of Boston, 1915–1916.
CHARLES E. HIBBARD, of Pittsfield, 1916–1917.
ARTHUR LORD, of Plymouth, 1917–1918.
JOHN W. CUMMINGS, of Fall River, 1918–1919.

THE ANNUAL DINNER.

The annual dinner of the Association was held at the Hotel Bancroft, Worcester, Massachusetts, on December 4, 1919. Hon. John W. Cummings, president of the Association, presided.

SPEECHES AT THE DINNER.

ADDRESS OF THE PRESIDENT.

Gentlemen:

It is a great privilege and a great pleasure to extend to you the greetings and welcome of the Massachusetts Bar Association.

Tonight we are meeting in the home city of the Chief Justice of the Supreme Judicial Court, and I take this opportunity to express in your name, for you and for myself, the sentiments of profound respect which we cherish for him, and to assure him that it is an honor to receive him as our guest.

I was reading the other day, I think for the first time, the avowed purposes of this association as they were set out in the charter and in the Agreement of Association, and one of them was "encouraging cordial intercourse among the members of the Massachusetts Bar." When I recall how happy the dinners of the Bar Association have been and in what numbers the members have attended them, I think it is safe to say that the purpose of encouraging cordial intercourse, has been accomplished.

Perhaps I may be permitted to congratulate the Association this evening on the success which has attended its efforts to bring about cordial relations, remembering that we are denied the aid of one of the greatest promoters of social, and cordial, and convivial relations and intercourse which we have had in the past.

Another purpose, as I found, of the Association was to aid in the administration of justice. That is a very natural purpose and desire of our profession; and I think that notwithstanding the precedents are against the presiding officer speaking more than a few words of introduction, I will ask your hearing patiently while I speak, briefly, upon what can be done and what should be done by our association to aid in the administration of justice. I am induced to speak of this, not because the purpose is avowed in the charter, but rather because the present Judicature Commission has undertaken a serious work with large and very extraordinary powers, attempting to ascertain the condition of the courts and procedure, with a view to aiding in the prompt, economic, and just despatch of judicial business.

You will permit me to recall to you the condition of the judicial department of government, so far as the attitude of a considerable portion of the public is concerned, for the past twenty-five years. I believe I am stating the case within the facts when I say that the judicial department of government for the past twenty-five years, not simply in Massachusetts, perhaps not more in Massachusetts than in other parts of the country, and I am inclined to think not any less, has been under the most severe and searching scrutiny, has been the object of the most constant attacks, and has throughout that period had more investigation, more examination, more hostility directed to it than any other department of government.

The functions of the judiciary are not representative. I speak of this because I think it explains how easy it is to direct and concentrate and keep up an attack upon that department. The judiciary itself does not respond to majorities. It has no opportunity to make friends. Perhaps, if the truth were told, it makes more enemies than any other department of the government. There is a fair half of the procession constantly moving through the courts coming out disappointed. The courts cannot compromise. They have to decide things as they find them, and the result has been that the courts do not, cannot in the ordinary sense, make friends. Men fear the courts, another reason why there is less sympathy and less friendship for the courts, just as all men naturally fear justice. Portia's aphorism was true before she

spoke it, "that in the course of justice none of us should see salvation." Men are afraid of justice, and even those who walk in serenely confident very often come out humbled and distressed. Now, when I say that men fear justice, I do not mean when men search for justice. A man seeking for justice, defiant and confident, who stands like the suitor in "The Merchant of Venice," and says: "I stand for justice; answer, shall I have it?"—presents one condition of things. He is seeking justice. It is quite another and a different condition that is presented when justice seeks him.

The courts have been attacked from many angles, the recall of judges, and the recall of decisions, among the most notable attacks, not wholly abandoned, but temporarily put off; and there is still a program of attack well conceived, generally well-conducted and apt to be carried out to the end.

The discontent I spoke of among the multitude of disappointed ones who come out of the courts was an unorganized discontent, and so long as it remained in that state there was no serious menace to the courts; but for twenty-five years there has been a steady organization of the disappointed and the discontented. It grew, as you know, out of the decisions of the courts granting injunctions in industrial disputes. Those decisions brought about a condition of things which was spoken of with great reproach as "government by injunction." They induced a large number of citizens who were fast becoming a great political power to unite; and one definite purpose of the union, not concealed, in fact avowed, is to withdraw from the courts the power to issue any order or decree or writ interfering in industrial disputes.

That has been the case, and has been known to be the case generally, throughout the United States. It was brought to the attention of the people in Massachusetts when the Consitutional Convention assembled. While there has been a very serious change made in the law making power, quite as serious a change was proposed in the judicial department. I have in mind the attempt that was made to bring the courts under the direct control of the people by including within the scope of the initiative and referendum a provision authorizing the dealing with all matters relating to the judicial department by means of that procedure. I doubt very much, gentlemen, whether, if the exemption had not been made ex-

cluding the courts from the operation of the initiative and referendum, we should have passed through the recent state election, taking place one year after the adoption of that constitutional amendment, without having before us a provision dealing by the initiative with the courts.

An unrelenting and continuous attack has been made upon this department of government. It is, therefore, necessary to arouse and stimulate the interest of men in the judiciary, especially the interest of those who understand the value of that department and to induce them to come to its rescue, to come to its assistance, rather, to take their place in an effort to maintain and develop it.

Sometimes a subtle and dangerous attack upon the courts has been successfully made under the guise of remedial legislation which has resulted in taking from the courts a large volume of questions, of controversies which had always been considred justifiable, which had always been regarded as belonging to the courts, and transferring them to commissions. You will not misunderstand, I think, that I mean to criticize the purpose of the Workmen's Compensation Act. I do not criticize the general scheme to give relief to workmen, to relieve them from the operation of severe and I think unjust laws. No, I am in entire sympathy with that. But what I contend is that while all questions growing out of the settlement of legal claims may be sent to commissions, they should be court-established, and not executive commissions. The Workmen's Compensation Act took from the court a large volume of business; it took from the judicial field a large part that was essentially judicial. There are other instances where for example, the question of a man's citizenship, which ought, on the face of it, to be a subject for judicial inquiry, is referred to a commission, a part of the executive department, and decided by it without appeal. I saw recently a statement made by a man who had given two years of service during the war to departmental work, industrial work in Washington. When he was asked what was the result of his experience, he said, he was convinced that it was necessary to transfer to executive commissions all and every dispute that arises wherever there are industrial relations. Of course if that idea prevails, if there is also to be a commission to decide and settle as it does the question of whether

or not a man suffered an injury in the course of his employment, and the extent of it, to decide and settle liability for accidents on the highways, if there are to be comissions dealing with those things, it is just in line then for the commercial man, the business man, to say: "Our business differences should be settled by commissions." Sooner or later that tendency will result in the shrinking of the judicial field until the strength and worth of the courts will be sensibly diminished. If carried out it will destroy trial by jury and with it our judicial system.

I speak of these things, gentlemen, tonight because I understand the Judicature Commission invites the aid of the association in the investigation which it is making under the law passed last June. I believe that we can help the commission. At a time like this of shifting levels, when everything connected with government is more or less disturbed and uncertain, it may be well for us to go slowly in making changes in the judicial department of government. We may make repairs, but until we reach a time of greater repose, of greater certainty, of greater rest, it is the part of wisdom for an association like ours to advise delay, notwithstanding the clamor for prompt justice. On the whole, I think justice is administered with promptness in this commonwealth.

And so, gentlemen, I have ventured to take up this time to speak of the matter that was uppermost in my mind, the work of the Judicature Commission. I hope that this association will seriously undertake the organization of its forces and bring aid and support and help to that commission.

Now, gentlemen, here in the home of the Chief Justice, although he holds, as he told me, a certificate of exemption from being called upon to speak,—I am sure it would be unpardonable if I permitted that certificate to get by, and I have ventured to tell him that I could not receive it. More than once in the course of forty years the court has said something like that to me. I cannot receive it and you cannot receive it. I know with what delight you will welcome him, and I have the honor to invite him to address you.

REMARKS OF CHIEF JUSTICE ARTHUR P. RUGG.

Mr. President,—Brethren of the Bar:

I long ago learned that it is a fundamental principle of happy living to hope for the best and to receive with a smiling countenance the worst. And so, notwithstanding immunity from public speech which was promised for this occasion, I am glad to say just a word of welcome to this association, meeting in my home city.

It is a distinction to any city in the Commonwealth for the Massachusetts Bar Association to meet in it. I welcome you to the Heart of the Commonwealth. It is a real pleasure to me to be here and to renew the associations of personal friendships without regard to the line which so frequently divides intercourse with the bar.

In this city of Worcester there is peculiar appropriateness in asking you to go back to the days of my first predecessor under the Constitution in order to narrate an incident of high importanee in the development of the constitutional law of this country which arose and was adjudicated here. It is familiar historical knowledge that before the adoption of the Constitution slavery existed in Massachusetts. There is in one of the public libraries in this county a bill of sale of a slave which was executed and delivered after the Declaration of Independence and even after the event to which I am to invite your attention. I don't know how many slaves there were in Massachusetts in 1780, but they were not uncommon. One named Quork Walker lived in the town of Barre. His master asserted over him the authority—the supposed authority—of the owner of a chattel, to the great distress of some of his neighbors. Perhaps they incited Quork to resist, perhaps he decided on his own account to assert the rights of a freeman. Whatever the cause, the result was a considerable course of litigation which finally came before the session of the Supreme Judicial Court held in Worcester in April, 1783. In those days the entire membership of the court travelled on circuit and presided over trials of questions of fact to a jury and decided questions of law there arising. The question whether slavery continued to exist in Massachusetts notwithstanding those declarations of personal freedom which are embodied in the Constitution came before our court

of last resort for decision in this town respecting the black man from Barre. The right of personal liberty was argued by one who bore a name distinguished in the annals of this county—by the first Levi Lincoln, an immigrant from Plymouth County—in your neighborhood, Mr. President—a man who, as some of you may recall, subsequently became a cabinet officer during the presidency of Jefferson and was honored by appointment to the Supreme Court of the United States, an honor which was declined. Levi Lincoln espoused the cause of freedom, and argued against the proposition that this poor slave out in the country still continued to be a chattel, and urged that he had been set free by the mandate of the people manifested in our Constitution. This was, I believe, one of the first, if not the very first, constitutional question of importance to be decided by our court. William Cushing of Scituate, who was the first Chief Justice under the Constitution, delivered the opinion of the court to the effect that the guarantees of personal liberty, individual freedom, the right to life, liberty and the pursuit of happiness, secured by those familiar provisions of our Constitution, made the air of this Commonwealth too free for any slave to breathe, and released from bondage to any human master every slave within our borders.

That was the interpretation of a constitutional provision made by our highest court against powerful interests and in behalf of human freedom. It was an interpretation of provisions of the Constitution which, almost word for word, were to be found in the constitutions of Virginia and other of the states of the Union. If the judiciary of all of the states of the Union had had the independence and the courage and the soundness of judgment and the vision of the future which William Cushing and his associates had in 1783, the history of the nation would have been changed and the bloody days of the Civil War would have been prevented.

Therefore, Mr. President and gentlemen, as you meet in this Heart of the Commonwealth, it is worth while to remember that there was declared hereby the highest court,—not by convention not by popular vote, not by act of the legislature, but by the Supreme Judicial Court of the Commonwealth—a principal of individual freedom and personal liberty, which has made Massachusetts the vanguard of

civilization through all the years which have passed since that memorable day.

PRESIDENT CUMMINGS.—Gentlemen, among the other works of the Judicature Commission is the work of investigating the procedure of the courts. There is a gentleman here this evening who was a member of the Constitutional Convention, who was the chairman of the Committee on Judicial Procedure. He was also a member of the Committee on Rules and a member of the Special Committee and the sub-comittee which rearranged the Constitution. He was a very busy man. In all my acquaintance among the members I know of no one who had a greater or more varied experience than he. I heard him often in debate. His speech was plain and direct, and he spoke with the courage that came from conviction. He was not only a learned counsellor but a wise one. It is an extreme pleasure tonight to invite him to address the association, Honorable Albert E. Pillsbury.

ADDRESS OF HONORABLE ALBERT E. PILLSBURY.

Mr. President,—Mr. Chief Justice, Brethren of the Association:

Surely the sugar famine has not reached Fall River. Nothing so sweetening as this has been offered me since we were first put under food restrictions. The president is too kind. He speaks out of the partiality of an old friendship, when we were boys together in that public playground, the House of Representatives. But we all know that postprandial compliments are endorsements without recourse, carrying no liability to him that makes them and not even putting the recipient under the handicap of having to make them good, which would be, indeed, a serious situation for me.

My embarrassment is due to a wholly different cause. The text which I am expected very briefly to expound, the late constitutional convention, was suggested by the very active and accomplished secretary of this association. But he has not told me what to say, and there is so much to be said of the convention that might be profitable, perhaps, but would be unconscionably dull, and so much that might be

entertaining but unfit to be said publicly, that I feel a serious responsibility in the selection—somewhat as I suppose the minister feels at the funeral of a citizen whose character was too shady to permit the usual post-mortem tributes, while on the other hand nothing must be said to disturb the feelings of the friends of the deceased. If I do not succeed in steering successfully between these difficulties, I trust it will be remembered that I am expressing the views of only one of the three hundred and twenty delegates, of whom several of the most distinguished are now in this room and can reply if so minded, and in any event, as an accomplice in the crime no conviction ought to be had on my uncorroborated testimony. As it would be difficult to treat comprehensively a convention three years long in thirty minutes or less, I shall only attempt to throw some side-lights upon it. And if in trying to do so I speak of some things that may seem trivial to serious-minded men like you, some things not recorded in the journals or debates, it is because they are not recorded there but are essential to a true estimate of the convention, or a true picture of it if anything like a true picture is to go down to our successors.

As the circumstances which surround a man's birth are usually liable to have some influence upon his future, so I think the origin of that convention was one of its most significant chapters, and perhaps the first thing to be said about it is that it did not arise out of any popular interest in the subject. It was not a people's movement. The convention was a wholly artificial product—a product of agitation by a handful of men, and a small handful at that. It was common remark at the time that the convention act, put forward but put aside in 1915, was forced through a reluctant legislature in 1916 under whip and spur of the governor who himself was under whip and spur of a powerful political leader. Of the voters who went to the polls when the act was submitted for acceptance, but little more than a third had interest enough in it to vote for it. The motive power behind the convention was the determination of a few men—I might almost say of one man—to force the initiative and referendum into the Constitution of Massachusetts. A few estimable gentlemen whom the censorious might stigmatize as political faddists had been conducting for some years a sort of parlor campaign for it.

Everybody who had a grievance against the legislature, everybody who thought he could get from the people under popular clamor what he could not get from their representatives acting under some sense of responsibility, was naturally for it. All the ambitious of popular favor, seeing another opportunity to tickle and flatter the people, naturally fell into the procession. The labor leaders, thinking they saw in the I. and R. a new weapon for their own hands, and in a convention a possible opportunity to abolish the labor injunction, the object of their dearest hopes, threw all their influence for it. Some other influences may have contributed in some degree, but these were the motives out of which the convention arose.

The Convention act of 1916 being accepted, an I. and R. organization was formed and an active canvass begun throughout the state for the choice of delegates pledged to the I. and R. A circular was addressed probably to every man who was publicly mentioned as a candidate, covertly threatening him with defeat if he refused to pledge himself to the initiative and referendum. In the course of that campaign a touching tribute was paid to our highly enlightened system of popular primaries. Absurd as it appears, it is an authenticated fact that in framing their tickets for delegates at large the managers were seriously influenced by the initial letter of the candidate's name, gentlemen beginning in A being deemed to possess superior qualifications for a Massachusetts Constitutional Convention, and so on down. It was assumed without hesitation—and the result at the polls bore out the assumption—that the infant feet of the average voter at the primaries or the polls could not tread safely down the rugged path of the alphabet much below the limits of the rule formulated at the time by choice spirits of sporting proclivities as "E or better."

The organization prevailed, as might have been expected and as its usually does. The people were indifferent, and a clear majority of delegates was elected pledged to the initiative and referendum. In short, it was a packed convention, having that measure for its principal motive and purpose.

It would naturally result from these auspices that the personnel of the convention was not in all respects what might have been expected of Massachusetts. On the roll of the convention of 1779 are substantially all the shining names that

have come down to us from that generation, with John Adams at the head. The convention of 1820, led by Webster, Shaw and Story, presided over by Chief Justice Parker, was scarcely less distinguished. The convention of 1853 was an assemblage of all the talents, considered then and since the most remarkable body of men that ever assembled in Massachusetts if not in the country, of whom somebody said at the time that it could have furnished the national government with a competent Supreme Court, Cabinet and Congress, with enough left over for a Massachusetts convention.

It would not become me, even if there were occasion, to disparage the membership of the late convention as it was. But surely it was remarkable for the men who were not there. It must be confessed that the ripest wisdom and experience of Massachusetts were not present or represented. For example, it would surprise people in other states to know that a Constitutional Convention had assembled in Massachusetts without such a man as President-Emeritus Eliot being made even a candidate for it—a man whose words are of weight around the world, with whom we do not need always to agree to appreciate the value of his counsel. No great leader in education was there. The only college president who became a candidate was defeated at the polls. There was official experience, indeed, in the person of several ex-governors, several who had served as the state's principal law officer, and forty-odd graduates of both houses of the legislature, included in about double that number who had served in one branch or the other. But neither of the national senators, but one congressman, but two or three who had served in Congress, not one judge and but one ex-judge of the higher courts, only half a dozen of the clergy, so numerous in the earlier conventions—a fact perhaps of some significance; none of our most eminent bankers or financiers, not a great manufacturer or head of any of our great distinctive industries in the most distinctively industrial state in the Union; no leader in the field of transportation, no manager of any of our great public services. In the atmosphere that surrounded the choice of delegates such men were not likely to offer as candidates, and they did not, nor would they have been likely to be elected if offering.

In the initiative and referendum majority was included a representation, strong in numbers, of organized labor—the

only Massachusetts interest, if that is a Massachusetts interest, fully represented as such in the convention,—which did not scruple to avow openly that it was there to look out for its own cause. The lawyers also were strong in numbers, being one hundred and fifty-odd, among whom real leaders at the bar were not wanting. But they were not there as a class; on the contrary, they exhibited at all stages of the proceedings the pleasing diversity of opinion and conduct which may always be expected where two or more of us are gathered together in the name of the law. The leadership was never with the lawyers—a happy omen, no doubt, from the popular point of view. The most powerful man in the convention —the leader of the convention, if it had any leader—was a local political magnate whose force of speech and character fairly entitled him, perhaps, to that distinction.

The convention being committed in advance to controversy and not to counsel, this character remained fixed upon it—the character of a factional and fighting rather than a real deliberative body—throughout the proceedings, the original line-up of the I. and R. majority, though not remaining wholly unbroken, being the dominant feature of the convention throughout, giving color to all its proceedings.

I have no time to discuss the measures adopted by the convention, or those which it might profitably have adopted but did not attempt to adopt. But I cannot forbear a word of comment upon the I. & R., as we called it—not controversial comment, but a mere statement of facts. It was not the product of the convention, and it was not the act of Massachusetts, though this, be it remembered, was the only radical and fundamental change effected by the convention in the character of our government and the first, indeed, in the history of the constitution. It was worked out in advance by the junto to the last line of its cumbrous and unwieldy length, and brought in with the purpose of forcing it through the convention without substantial change—a purpose which was not fully accomplished, fortunately, though some changes made on the way were more for the worse than for the better. It is not a sound and natural growth, from the roots, out of the sentiment of the people of Massachusetts, as constitutions must be if they are to stand, but the work of a comparatively small faction, a piece of minority government pure and simple. It

was adopted at the polls by a majority of less than 9,000 in a total vote of but 332,000 out of our 626,000 registered and 775,000 qualified voters, but little more than a third of those who went to the polls and voted that day supporting it, and this majority cast wholly in the city of Boston, while an adverse majority of nearly double that number was cast against it in the state at large. It cannot be doubted that this Boston majority was due to the influence of a single newspaper, whose influence indeed upon the convention itself was open and unmistakable; a newspaper controlled, as it is understood, by a citizen of New York whose political character and reputation are familiar to the country. Whenever and wherever the I. & R. is mentioned, it ought to be remembered that it is in the constitution of Massachusetts by the influence of William Randolph Hearst.

My friend the president has referred to the attitude of the convention toward the judiciary, perhaps the most interesting topic for this audience. It was a divided attitude. It was evident in the earliest stages that the majority was jealous of the courts and probably would not tolerate any extension of their powers; and this was made clear when a measure was proposed in the line of a reform now urged and taking root in various parts of the country, some discussion of which may be impending in the meeting of this Association tomorrow—a proposal to put the whole control of judicial procedure into the hands of the judges, in the interest of efficiency, speed and economy. It was quite certain that nothing of this kind or any kind of law reform could be adopted in that convention unless the lawyers, at least, would stand together for it. And when it became apparent that the lawyers were seriously divided upon this proposal, with many of the leading members preparing and determined to defeat it, it had to be abandoned to avoid sheer waste of time in fruitless debate when the convention was pressing for adjournment.

The first real test of the temper of the convention toward the courts came in the battle for abolition of the labor injunction, one of the sharpest of the convention. On this the I. & R. lawyers divided and the convention refused to abolish the injunction, and it was then evident that it could be held against any serious inroad upon the powers of the courts as they are. And when the final assault was made on the inner

defenses, when the judiciary was directly attacked in the measures to which the president has referred,—for limited terms, an elective system, in general for popular control of the judges—the convention rose to its highest level, as did the convention of 1853 under the eloquent appeal of Rufus Choate which has not yet spent all its force in Massachusetts, and stood firmly against it. Nothing more creditable or more hopeful came out of the convention than this testimony, such as it was, to the continuing faith of Massachusetts in the independence of the judges.

The convention did one public service of unmistakable value in rearranging the text of the constitution in connection with incorporating the amendments. I know there is some difference of opinion about this, but I cannot believe there is occasion for any. There was considerable sentiment in favor of rewriting the whole text, and some substantial reasons for it, and Professor Hart is entitled to great credit for the labor he bestowed upon a complete redraft and for gracefully yielding his view when it appeared that the committee were not prepared to go so far as this. Every lawyer knows, and surely every one who had any part in the work of rearrangement has reason to remember, that the form of the old Constitution was about as bad as it could be, either in mechanics or in logic, the sub-division into parts, chapters, sections and articles making it impossible of convenient reference even if subjects had been arranged or classified in any logical or symmetrical order, a difficulty aggravated with the progress of time by necessary cross-reference to a long series of amendments. Indeed the rearrangement was largely a necessary part of the process of incorporating the amendments.

To rearrange the Constitution would not, perhaps, be called a work of statesmanship, but it was more exacting if not more important. If you think it was a light task, ask Judge Morton, who bore the brunt of it. The mechanical process was tedious and trying enough, and when you remember that it called no less for complete understanding of the text of the Constitution and all the amendments, and complete command of their history, and that it was to be done without effecting changes of meaning and that a word out of place might make trouble, you will realize something of what was involved in the mere recasting of the Constitution into convenient and usable

form. There may have been some slips in the process—human infirmity could hardly avoid it—but they can hardly outweigh the immense and permanent convenience of a text assembled by subjects in a natural and logical order, plainly indicated by topical heads and divided into sections consecutively numbered from beginning to end for the readiest reference.

It has been said that we shall have two Constitutions, the old text and the new. I do not know whether the authors of this suggestion expect it to be taken seriously, but it appears to me inappropriate and unfortunate, as tending to raise doubts for which there is no room and no occasion.

If the convention had stopped with making a redraft or rearrangement, it would have been a very different thing. But the convention submitted its redraft to the people, and it was adopted by them; and it is the people, not the convention, who speak in it. And they declare in plain words in the preamble that they ordain and establish it as the constitution of the Commonwealth of Massachusetts. I suppose the constitution last adopted is the constitution, though it may be a codification or rearrangement of a former constitution, and I do not suppose that a purpose can reasonably be imputed to the people to have two constitutions extant at the same time, or to leave room for any doubt whether that which they declare to be the Constitution is the Constitution. And further, the Convention Act, though I do not think we need resort to it—under the terms of which the convention had power to revise the Constitution, as much or as little as it saw fit, though I think that power was derived directly from the people and not from the Act—declares in plain terms that if any revision or amendment is made and submitted to the people and adopted by them, the constitution shall be deemed to be so revised, altered or amended, and if not adopted the old constitution shall be and remain the constitution.

This is an end of the matter, and but for the fact that Section 157 declares that the rearrangement, meaning, of course, the process of rearrangement, shall not be deemed to change the meaning or effect of the constitution and its amendments "as theretofore existing or operative," which is, I suppose, the peg on which the theory of two constitutions, if there is any such theory, is hung—it probably would never have occurred to anybody that there could be any question about it.

This clause was intended, and I presume will be taken, to make it clear that the convention did not intend changes of meaning or effect in making the rearrangement. Not to keep the old text in force as the constitution—the words "theretofore existing or operative" clearly imply that it is no longer in force as the constitution though we do not need the implication—not to keep the old text in force, but to aid the construction of the new. Of course the old text remains for all purposes of historical or judicial reference—as Lincoln aptly remarked, you cannot repeal history—but not as theretofore existing or operative as the constitution. It was not deemed necessary to formally annul it, being necessarily superseded by the new text which the people were to adopt, if at all, as their revised or amended constitution.

I do not think that those who were concerned in making the rearrangement have any pride of opinion in it, and certainly they did not covet the task, but this sort of criticism is not adapted to the subject. We are dealing with a constitution, and it has been pretty well established since Chief Justice Marshall's time that a constitution is not to be construed by looking at it through a pinhole.

I think, perhaps, that somebody who is disposed to be critical has not looked quite critically enough at Section 157. The rearrangement, it says, shall not be deemed to effect changes of meaning, not being so intended. But new words, or new provisions, or altered provisions, if the convention chose to put them there, and the people chose to adopt it leaving them there, are not "rearrangement."

Let us test this. Suppose—while I hope it is not likely—that in spite of all our efforts to preserve continuity of meaning, something is found in the new text which cannot be reconciled with the old, even by the aid of the rule of construction declared in Section 157. As rules of construction must give way to plain words when the two are irreconcilable, must not the new text govern, being the people's text, which they have adopted as their revised and amended constitution, and their last word? There can be, I think, but one answer to this question. If so, we have but one constitution, and we know where to find it and I think that we shall find in the rearrangement of the text the best title of the convention to respectful remembrance.

PRESIDENT CUMMINGS.—*Gentlemen:* A book dealing with the administration of justice has recently been published. It has been received with great satisfaction and approbation by our profession and by students of government, especially those who make a study of the judicial department of government. The author is here. It has been a surprise to many to know that a work of such thoroughness and care, if I may say it, a work showing so much wisdom, could come from a man as young as he. It was not a surprise to me. I have known him all his life. I know the household out of which he comes, a household stored with good works. That he should look for the best means of securing justice to the poor was not a surprise, because interest in the poor, interest in the burdens they had to carry and the way they carried them, the attempt by Christian charity to uplift them, was constantly before him. He has accomplished a work which is a distinct contribution to the literature relating to our professional labors. It is calculated to preserve the confidence, to induce people to cherish the confidence, that the intelligent public has felt for the courts. I think it is going to win a great many to a more careful study of the efforts that are being made to bring justice to all the people, unpaid for and without delay, and to secure to those who carry the heavy burdens, the attention and the assistance of those among us who have lighter cares. Most of you undoubtedly have read his book. He has indicated the way that may be followed to bring relief to the poor, to bring justice to the poor. I have great pleasure in presenting, Reginald Heber Smith, Esq.

REGINALD HEBER SMITH, ESQ.

Mr. President,—Mr. Chief Justice,—gentlemen:

In a time of crisis such as is the present, I feel that no man has a right to attack or criticize an institution so vital to society as the administration of justice without first publicly proclaiming the fundamentals of his own creed. For, unless he does that, honest men may see him out of proportion and out of perspective, and therefore disagree with him and fail to sympathize with him; and dishonest men are quite certain to seize on his words as a pretext for destroying an institution which he seeks to preserve through improving it.

Applying that sentence to myself, let me proclaim to you the fundamentals of my creed as it affects the law and the administration of justice.

First, I believe that the judges of America constitute the most able, the most faithful and the most upright class of public servants in our country. And what one can say of the American judiciary can be said of the Massachusetts judiciary *a fortiori*.

The disabilities from which the poor suffer to-day are not the result of any class warfare or the result of any deliberate intention on the part of any dominating class which set out consciously to foreclose the rights of the poor. Nothing of that sort accounts for the present condition of affairs.

In the first place, the great body of the American substantive law seems to me to be absolutely democratic. It is no respecter of persons. It confers its rights and imposes its liabilities equally. And that, gentlemen, is a tremendous achievement, for in other times and in other countries the substantive law has been a respecter of persons.

All that we have got away from. The American substantive law is a splendid achievement.

Now if law were self-enforcing we should have an absolute equality of all men before the law. But it is a commonplace among lawyers that law is not self-enforcing, that law in books is one thing, and that law in action unfortunately is quite another. Law, after all, is law only when it is given life through enforcement in the courts. In last resort that becomes the definition of law, and, therefore, in last resort all rights, all legal rights, depend upon the ability of one citizen, no matter how humble, to protect himself through the courts if any invasion of his rights is attempted by any other citizen, no matter how powerful.

It is for that reason that the administration of justice occupies so tremendously important a place in America, because America is a government of laws. On those laws all rights, even the rights to life, liberty and the pursuit of happiness, depend. And yet we as lawyers know that the tangible proof of whether a man has those rights or not is his ability to enforce those rights through the courts if the rights are called into question.

What, then, is the existing situation in the administration

of justice as the poor see it and as the immigrants in this country see it?

Let us approach that through the eyes of an Italian immigrant who has been in this country just long enough to have his first citizenship papers. He came to my office in the Legal Aid Society in Boston one Saturday afternoon and told me this story. Three weeks before he came to see me he had been met at the gates of his factory by an agent who came to him and tried to interest him, in fact did get him interested, in a phonograph. And he said to this Italian, "All you need to do to get this phonograph on approval is to sign your name on this blank sheet of paper and write your address so that we have the record." The sheet of paper was folded over about like a leaflet. The Italian signed, had the machine delivered to his house, found that he could not afford to buy it, and asked the company to take it away. The phonograph company said to him, "Certainly not. Our transaction was a legal sale. You owe us $43." And when the Italian objected they unfolded the sheet of paper and the upper half had printed on it a valid form of an assignment of wages. This was before the 1916 act which improved the assignment of wages situation, so that under the law as it then existed, if a man assigned his wages, all his wages went to the assignee. A copy of this fraudulent assignment of wages was served on the Italian's employer and, of course, it looked all right and the employer was not seeking a quarrel, and he therefore did what the employer always does—he held up the man's wages until the dispute should be settled. Now the phonograph company knew that that was what the employer would do, so it just "sat by and waited." That had happened for three weeks; the Italian had received no wages; there was no food in his house; his credit was exhausted, and he came to me to know what he could do. I thought, "what can the law of Massachusetts do for that man?" If I bring a suit in the Municipal Court of the City of Boston I can get a very quick trial there, but the defendant can remove it to the Superior Court. And if I were here in Worcester there would be no use bringing it to your District Court, because there is an appeal as a matter of right which would mean even more delay. I knew that the law of equity would cancel that assignment of wages as a fraud, but before that Italian could get into the court of

equity he would have to pay the three dollars entry fee, approximately five dollars to the sheriff for service, and let us say ten or fifteen dollars to an attorney to draw and present the necessary petition. Now, by hypothesis, the Italian did not have the money to pay the costs of court and of the attorney,—the very reason he went to the court seeking relief was because he was without money, and yet that was the situation that presented itself to him. It seemed to me, gentlemen, that so far as that Italian was concerned he would have been just as well off if there had been no laws on the Massachusetts books protecting him. And if you do not agree with me I know that the installment house that sold him that phonograph agrees with me. That was a commonplace transaction with them, as the number of complaints which came to us proved. They had built up a business on the principle that as against the poor you can violate their legal rights with impunity.

That case shows the great defects in the administration of justice from which the poor suffer. They are, first, the delay; second, the expense levied by the state in the form of costs and fees; and, third, the expense of hiring an attorney.

Let us consider those briefly. As to delay, Massachusetts stands far ahead of the other states in that she has abolished delay to a very, very large extent. The time when you could appeal in the hope that the other side will die before the case is reached has long since passed out of our courts. It does seem to me, however, that the intermediate appeal from the lower court to the superior court and then to the supreme court is an unnecessary delay in our judicial proceedings. There are other proceedings where a summary proceeding is the only action that can afford justice, and as an illustration I will show you one, in a minute, where we ought to try to speed things up and can speed things up.

The subject of delay is one that seems to be generally understood. Public conscience is aroused on the point that delay in the law is a bad thing. Therefore I look to see remedies and reforms go forward which will abolish delay, as far as practicable, and I think that we can expect those reforms in the near future.

Now, secondly, as to court costs and fees. That is an extraordinary subject. I doubt if anybody outside of a taxing

clerk really understands court costs and fees. After reading all the books I can find on the subject I do not pretend to know a great deal about it. It has always bothered me to know why my client who won his suit in the Boston municipal court or any court, for that matter, would be given by law a two dollar and a half attorney's fee where I probably charged him $25; whereas, on the other hand, the law gives him a dollar for a writ which he could buy at any law stationer's for five cents. It has always bothered me to know why, if a cook who worked in the Hotel Touraine in a suit for wages appealed from the Boston Municipal court to the supreme court, he would pay an entry fee of $3, whereas if his brother who worked on the steamship La Touraine appealed in a wage suit from the federal district court to the circuit court of appeals, the entry fee would be $35, although in both appeals the question would be exactly the same.

I have been told that costs were a deterrent, and yet I know that costs are not high enough to deter a good many fraudulent pieces of litigation, and I know that on the other hand they are sufficiently high to keep out of court many honest pieces of litigation.

The present system of costs bears no relation to the expense of parties or the expense of the state. And if you go back over history you find that as soon as the system of costs was invented they also invented the system of giving the poor their relief without costs in proper cases. Pollock tells us that the early English kings charged money for their writs—it was one of their sources of early revenue; but Pollock further says that the kings always gave the writs to the poor for nothing, and by the time of Henry VII in England there had been passed a very comprehensive law liberally providing for the method through which poor persons should get their writs drawn, sealed and delivered without any cost whatsoever. Curiously enough, we in America, particularly in Massachusetts, have taken over the whole system of costs built up by English statutes and absolutely forgotten the corresponding provision of the *In forma pauperis* statute, allowing a man to sue without prepayment of any costs, which in England as long ago as the time of Henry VII was deemed essential to justice. It seems to me, therefore, that it is not revolutionary to suggest that in America, in the twentieth

century we shall have a statute which was found to be in the interest of justice in England in the time of Henry VII.

We get into all kinds of trouble as a result of our failure to have such a statute.

I think the worst illustration that has come to my knowledge is this: During the war the Soldiers' and Sailors' Civil Relief Act made it the duty of every lawyer to bring to the attention of the court any case in which he knew the rights of a soldier or sailor were being violated. Very well. On the fourth day of September, 1918, I received a cablegram from Paris advising me that a corporal of the 43d Engineers understood that a mortgage on his property was to be foreclosed the next day. I had the cablegram and nothing else. I drew the necessary form of petition and took it to the superior court. The judge gave me the relief I wanted and I had the temporary injunction served on the mortgagee. But, gentlemen, before I could get that relief I had to pay the entry fee and I had to pay the clerk for a certified copy of the decree and I had to pay the sheriff for service. Now that is wrong. I was acting for a soldier who was not even my client. I had never seen the man, I never have seen him, I never shall see him. I was doing my patriotic duty. The court penalized me. It was not the judge's fault, it was not the clerk's fault, it was not the sheriff's fault. So far as I could see, they were merely obeying the law of our Commonwealth. There is apparently in our law as thus far understood no provision which gives to the court discretionary power to say that justice is more important than costs, and if the two principles conflict in a proper case it is the costs that must yield instead of justice.

If you want a dramatic illustration of that principle, one Campbell sued a railroad in Wisconsin. The Wisconsin law of costs is the same as what I understand to be our law of costs, although to-day our practice is not to enforce it—namely, that you can require a bond as surety for costs from a party whom you believe to be financially irresponsible. The railroad, therefore, required Campbell, the plaintiff, to furnish a bond to secure costs. Campbell replied that he was a poor man and could not furnish it. The judge threw his case out. He appealed, and the supreme court of Wisconsin, in a decision that Campbell's appeal was not well taken, said:

> "It seems almost a hardship that a poor man should not be allowed to litigate."

Gentlemen, it seems to me that is an outrage, committed not by the judges but by the inflexible requirement of expense, because society with one hand says to an injured man, or to an unpaid laborer, "You cannot go to your employer and knock him down and take the money away from him; if you do that, we will put you in jail; what you must do is to go to the court." And, on the other hand, if he goes to the court, the law of procedure says to him, "You must pay a certain amount of money as a condition precedent to a hearing of your case." And the man may reply, "I have no money; that is the reason I am here," but that is of no avail to him.

When a system of procedure outlaws a man as it did Campbell, then society should not be surprised if Campbell and the men like him turn outlaws and act like outlaws.

The most encouraging thing in the field of costs that has happened is a decision rendered in California in 1918. The facts in that case are so dramatic that they are worth stating.

A man whose daughter was wrongfully killed brought suit in California for the wrongful death and claimed his constitutional right to trial by a jury. The jury fee in California is $24, payable in advance. The man could not pay the $24 and asked leave to have his jury without prepayment of costs. But the trial judge said that there was no law authorizing any such action on his part and dismissed the petition. The man's affidavit showed that he had nine minor dependent children and that his entire worldly assets outside of the cause of action amounted to $23. He appealed the case and the Supreme Court of California went the other way. They said:

> "It is inconceivable that the legislature should have intended by its statute of costs to have cut certain persons off from any relief whatsoever."

And they then went back to the common law and they reached this decision—that it is the inherent power of every court of record to see to it that justice is attained even at the sacrifice of the system of costs.

That is a very intelligent decision. If that decision is followed elsewhere we may again get back to the old common-law days, and then this difficulty of costs will be obviated.

The third difficulty, the expense of lawyers—perhaps it is a little bad form to speak about that here, but yet it is a very important thing. We know that lawyers are expensive and we know why they are expensive. Reducing that proposition to its simplest form, it results in this dilemma—or trilemma, if there is such a word: first, if a person desires advice as to his rights or the conduct of a suit through the courts he must have a lawyer. That is known to all of us. Secondly, a lawyer is a human being; he must eat, and he must wear clothes, and, therefore, he must be paid for his services. That we know. Yet there are in our country millions of persons who need legal advice, who need the conduct of a case being taken through the courts, who are yet unable to pay the amount which a lawyer must properly charge for that work.

That is the great difficulty, and that is the difficulty that requires courage if we are ever going to solve it.

If I may be permitted to use a homely analogy to illustrate the importance of the lawyer in the doing of justice, I would use the analogy of the automobile. And of the automobile I should say that the judge represented the steering apparatus and the control; I should say that the law represented the motor, the engine, and that the attorney represented the gasoline. Why? Because it is the attorney that is the motive power of the administration of justice in most cases to-day. It is he through his motions, his investigation of the case, his briefing of the law, his preparation for trial, his questions when in court, who actually puts the case through.

Now, then, to give each of two men precisely the same type of automobile, supply one with gasoline and give the other none, and expect to get a fair race, is absurd. And yet that is practically what we expect people to do under the existing procedure in the administration of justice.

How can we get over that difficulty? There are a number of ways, of which I am only going to speak of two to-night, because the time is running out and you are very patient.

The first is the small claims court. That is a most interesting experiment. It is frankly an experiment of avoiding the expense of lawyers by avoiding the need for lawyers in cer-

tain types of cases. I can best tell you what the small claims court is and how it works by giving you an actual case. This is the famous case of Mr. A. versus Mr. B. I tell the story, because I can vouch for it at first hand. It is a case that I heard in the Cleveland court myself. Mr. A. was a tailor and pressed the suit of Mrs. B. He rendered a bill of four dollars and the bill was not paid. He then went to the clerk who has charge of the conciliation branch of the Cleveland municipal court, and he told his story to the clerk. The clerk tried to adjust the thing by telephone and failed. He then made the necessary docket entries to start the case for A., which amounted to copying the bill on the docket, and then he gave a little card to A. saying, "The case will come up on such and such a day, in such and such a room." The clerk then made out the summons to B., ordering him to be in the court on the third day thereafter. That summons is handed to a sheriff who puts it in the mail chute, Uncle Sam delivers it at a cost of two cents, and that is legal service in Cleveland.

I was in the court on the third day when this case came up. The judge called for A. and B. to come up to the bench, and they came up, and the judge heard what A. had to say about it. After talking with A. it was perfectly obvious that A. had done the work and pressed the suit of Mrs. B. and had not been paid. The judge turned to B. and said, "Why do you not pay this bill?" "Well, I will tell you, Judge. When the suit was delivered the man who delivered it insulted my wife, and I will pay no bill to anybody who insults my wife." "What do you know about this?" said the judge to A. A. replied that he had sent the suit by his errand boy, and admitted that the boy at times was inclined to be "fresh." "Very well," said the judge, "you go into my room there, take the telephone, and telephone to Mrs. B. and tell her if anything improper was said you are very sorry." The man accordingly went to the judge's room, used the telephone and came back. The judge said, "Judgment for A. in the sum of four dollars." B. took a little roll out of his pocket, pulled out four bills and gave them to A. They shook hands, said, "Thank you, Judge," and walked out of the court room arm in arm.

I said to the judge then, "If A. had refused to apologize what would your verdict have been?" "Precisely the same,"

he replied, "because this is a court of law. I don't use my own judgment, my own opinion; I follow the rules of law; but," he said, "in addition to that I try to perform the social function of a conciliator, and if I can succeed I am glad; if I don't I fall back on the law again."

A dramatic critic once said that if the authors of most tragedies would permit the leading characters to have a few frank words with each other at the end of the first act, the misunderstanding which was rapidly becoming the basis of a plot would vanish and the play would come to an abrupt and happy end. I have wondered what would have happened if the A. and B. controversy, which Cleveland, through the small claims court, turned into a comedy, had happened here in Massachusetts. If A. had gone to a lawyer, I think he would have told him to drop the case, that four dollars wasn't worth bothering about. If B. had gone to a lawyer he would probably at once have filed as an answer a general denial and payment and then he would have started an issue where there was no issue in fact. The only defense that he could think of would be poor workmanship. He would try to prove that after the suit was pressed it didn't hang quite right, and he would have Mrs. B.'s neighbors come in and swear to that, and, of course, A. would have to come in armed with a company of tailors who would swear that it was the best pressed skirt that ever left the shop. When they got into the trial, if during the trial any question about a possible insult to Mrs. B. was mentioned, A.'s lawyer would object, or B.'s lawyer would object, the objection would be sustained and the real solution of the case would be lost forever and they would go blundering on, the perfect living example of an absolute economic waste. Now they wouldn't fool the judge—A. would have got his judgment; but A. would have lost a customer, A. would have lost a day in court and he would be disappointed because he would have to pay his lawyer and he would be substantially out of pocket. B. would be mad; he would say that any law that made him pay a man who insulted his wife was a bad law, and he would blame the judge.

That is the difference between the procedure we have here and the procedure that has been worked out in Cleveland. The Cleveland procedure has been such an immense success that it seems to me we in Massachusetts ought to try

to have it, so that the people with small causes can go directly before a judge and get justice done.

I did intend to say something about the Domestic Relations Court and something about Industrial Accident Boards, but I am not going to—the time is getting too short.

The last thing I want to speak about is the work of the Legal Aid organizations and public defenders. Legal Aid organizations and public defenders are precisely the same thing. If you will grasp that fact you will understand the true situation which is generally misunderstood. It is only as a result of an historical accident that the Legal Aid societies confine themselves to civil causes, but because of that accident the system of public defenders grew up. Everybody thinks of the Legal Aid Society as a private charity and of the public defender as a public official. That is not true, the line of cleavage is not between the private charity and the public official; it is a line between the eastern part of the country and the western part of the country. In New York the Legal Aid Society is a private charity; in the West legal aid is operated as a part of the government, so that functionally legal aid work and public defenders' work are the same thing. The purpose is to provide lawyers for persons who cannot pay lawyers. That must ultimately be the great solution to the existing difficulty from which the poor suffer. Your Domestic Relations Court takes care of domestic relations cases, your Industrial Accident Board can take care, I believe, of most of the injured workmen cases, and I have spoken of the Small Claims Court with the small cases. But beyond that lies a whole realm of law with the multitude of diverse matters which constantly arise where attorneys are absolutely necessary and if justice is to be done both sides must have counsel, and if the poor man cannot pay counsel we must somehow supply counsel to him. That is what the public defender does in criminal cases, what the Legal Aid Society does in civil cases. The Legal Aid societies in this country are all new, they have only been operating a few years, but they have already furnished legal advice and assistance to one and one-half million clients and they have collected for those clients sums which would total between six and seven million dollars.

If any man really thinks that the existing procedure for

the administration of justice is enough as it stands to-day, let him ask himself the question, what would have become of that million and a half of honest, good American citizens, who were owed a sum of approximately seven million dollars which they had been unable to collect in any way so that they finally resorted to the Legal Aid offices? The Legal Aid work, splendid as it is to-day and important as it is to-day, I think cannot long remain a private philanthropy. I think justice is something which cannot long be entrusted to private hands. I think ultimately this Legal Aid work must pass under the control of the state, and that when it does so pass it should pass directly into the hands of the administration of justice itself under control of the courts. Because Legal Aid work is in reality merely one more link in making more perfect our system for the administration of justice.

Now you say, "What has all this to do with us?" It has everything to do with you. A very great judge has recently said:

> "Equal and exact justice has been the passionate demand of the human soul since man first wronged his fellow man. It is the dream of the philosopher, the aim of the law giver and the endeavor of the judge. It is the ultimate test of every government and every civilization."

Gentlemen, our government and our civilization cannot hope to escape being subjected to that test. The one attack on American institutions that I really fear is this attack on the administration of justice from the point of view of the poor and of the immigrants; and I fear that, only because it has just enough truth back of it to make it dangerous.

The power to remedy the entire situation in the United States is in the hands of the American bar, and the power to remedy the entire situation in Massachusetts is in the hands of the Massachusetts bar. The courts to-day have their hands so tied that they cannot themselves put through the reforms that they would put through to-morrow if they could. Therefore, before the courts can be made responsible and before they can be blamed for any defects they must be given the authority. That means legislation, and we are the people who

should be responsible to see that the proper legislation is passed. The bar can do it if it will, and I can conceive of nothing which would do more to restore public confidence in the bar than the knowledge on the part of the public that within the field of law the bar itself stands as the champion of the poor and the rights of the weak and the oppressed. But if the bar is to be the agency through which these reforms are to come, it must rouse itself and gird itself up and move a great deal faster than the bar generally does move.

Gentlemen, I tell you in all earnestness, this danger is a very real danger and the hour for definite and constructive action is now here.

THE ANNUAL MEETING.

The tenth annual meeting of the Massachusetts Bar Association was held at the Hotel Bancroft on Thursday, December 5, at 9:30 A.M. The president, Hon. John W. Cummings, presided and the following reports were presented:

REPORT OF THE EXECUTIVE COMMITTEE.

Five numbers of Volume IV of the "Massachusetts Law Quarterly" have been issued during the past year, four regular numbers and one special number for December, 1918.

In accordance with the vote of the association at its last annual meeting, the bill for a revision of the Poor Debtor Law was again submitted to the legislature on petition of the association. It was numbered "H 617." The bill was introduced this year in order to call the matter again to the attention of the legislature before the statutes were consolidated. The bill was that which had been previously approved, by the Judiciary Committee and by both houses of the legislature, in 1915, but had finally been rejected at the last stage in the senate. This year the bill was not reported to the house by the Judiciary Committee, presumably because, although the committee had favored the bill in previous years, it did not feel that the bill had any chance of passing in view of all the other important matters which the legislature had before it.

Several bills were introduced into the legislature, providing

for an increase in the salaries of the judges of the various courts, including the Supreme Judicial Court and the Superior Court. The subject was discussed at the meeting of the Committee on Legislation and at the meeting of the Executive Committee. The majority of the members present at the meeting of the Committee on Legislation were in favor of taking action in regard to increasing the salaries. The majority of the members of the Executive Committee present, however, felt that the policy hitherto followed by the Executive Committee, of not taking action in state salary matters, should be continued. Accordingly, no action was taken. There was also some difference of opinion, among members of both committees, as to the advisability of raising salaries in the state-wide courts.

Early in the summer of 1919, owing to the fact that lack of hotel accommodations in New London, Connecticut, made it necessary to change the place of the annual meeting of the American Bar Association, it decided to hold that meeting in Boston. This association joined with the Bar Association of the City of Boston in extending the usual hospitalities to visiting members of the American Bar, and agreed to share equally the expense involved. In order to do this, it was necessary for this association to appeal to members for subscriptions. The members responded generously and more than enough money was collected to meet the share of the expense to be borne by this association. The figures appear in the treasurer's report.

In regard to the balance of the subscriptions, the committee feels that the members who sent in their subscriptions would prefer, instead of having a small dividend declared, that the money be used by the association in connection with the annual dinners and other activities of which the members as a whole get the benefit. Accordingly, unless objection is made by subscribers, the money will be so used. Any subscriber who objects to this course and who prefers to receive a proportionate return of his subscription may obtain it by notifying the secretary.

The communications directed to the secretary of the association from the Conference of State and Local Bar Associations, inclosing the resolutions adopted by the conference in Boston, were printed in the August number of the "Massachusetts Law Quarterly" which was recently distributed. The appearance of that number was unavoidably delayed and an attempt

will be made to bring out the other numbers more regularly hereafter.

Mr. Beckwith, the treasurer, feels obliged to retire after a number of years of valuable service to the association. The committee recommends a vote of thanks in appreciation of his services.

Respectfully submitted,

F. W. GRINNELL,

Secretary.

At the last meeting of the association, the Executive Committee recommended that the association report the bill then pending before congress, relative to the salaries of federal judges, and the association so voted. (See 4 Mass. Law Quart., pages 105, 106.) A statement of the substance of the bill and the manner in which the matter was called to the attention of the association was contained in the notice of the meeting which was sent to all members of the association.

TREASURER'S REPORT.

SPRINGFIELD, MASS., December 2, 1919.

The Treasurer of the Massachusetts Bar Association presents herewith his annual report.

At the time of the last annual meeting there were 860 active and 43 honorary members of the Association. Since then 21 new members have been elected, 7 members have resigned and 24 members have died, and 1 member has been expelled. We now have 790 active members whose dues are paid to date, 5 members whose dues have been waived because they are in the service of the United States and 54 members whose dues are in arrears.

The following are statements of receipts and disbursements up to December 1, 1919, to which is appended a report of the auditors, Messrs. Frank M. Forbush and Frank W. Grinnell, appointed for that purpose by the President.

ABSTRACT OF TREASURER'S REPORT.

Balance from last account, November 25, 1918 . . .	$2,614.83	
Received from Annual Dues, interest on deposits, etc.,	4,264.29	
Received contributions for entertainment of American Bar Association	1,623	
General Expenses of Association		$4,100.86
Paid toward entertainment of American Bar Association,		1,058.79
Balance on hand December 2, 1919		3,342.47
	$8,502.92	$8,502.92

The main items of expense, as usual, were the annual dinner, expenses of the Quarterly, stenographic and clerical services, etc.

Of the amount subscribed toward the entertainment of the American Bar Association, there was roughly about $500.00 in excess of what was needed to meet the share of expenses borne by this association.

The balance has been added to the general funds of the association as explained in the report of the Executive Committee.

CHARLES H. BECKWITH,
Treasurer.

The report of the Treasurer was approved and a vote of thanks to the Treasurer for his services was unanimously adopted.

Footnote: The following certificate of the Auditing Committee was attached to the report:

December 4, 1919.

We have audited the foregoing account and find it correctly cast and properly vouched, and the balance stated of $3,342.47 was on deposit to the credit of the Massachusetts Bar Association at the date of said account, December 2, 1919.

FRANK M. FORBUSH,
FRANK W. GRINNELL,
Auditing Committee.

REPORT OF THE COMMITTEE ON LEGISLATION.

To the Members of the Massachusetts Bar Association:

As stated in the report of the Executive Committee, the bill providing for a revision of the Poor Debtor Law was introduced before the legislature in accordance with the vote of the association and the approval of the Executive Committee, but it was not adopted by the legislature.

At a meeting of the committee which was held early in the year, the bills pending before the legislature which provided for an increase in the salaries of judges of the various courts were discussed. While there was a difference of opinion among

members of the committee present at that meeting, the majority of those present favored the support of the bills increasing salaries of the judges of the state-wide courts. As to the bills relating to the various county and district courts, no action was taken. The by-laws provide, however, that the approval of the Executive Committee shall be obtained before action is taken in the name of the association in support of proposed legislation. As stated in the report of the Executive Committee, that committee felt the policy hitherto followed, of not taking action on salary matters, should be adhered to. Accordingly, no action was taken.

The Judiciary Committee reported a bill placing the conduct of disbarment proceedings in the control of the attorney-general after such proceedings are instituted in court. Hitherto, such proceedings have been instituted and conducted by the different bar associations after investigation and hearing by the grievance committees. In so doing, bar associations have merely performed a function which is open to any citizen of the state for petition of disbarment of any member of the bar in the interest of the public. The work of bar associations in this matter and of their grievance committees is often misunderstood. It is obviously the most disagreeable work which the bar association has to do and the members who serve on grievance committees are performing services which the public expects the bar to perform because there is no one else to do it. The attorney-general's office, like other public offices in the State House, is being constantly overloaded with additional duties. The secretary took up the question with the members of this committee whether any action should be taken in regard to the bill above referred to.

While the members of the committee did not express confidence in the soundness of the proposed legislation, they felt that opposition on the part of the association would be misunderstood. Accordingly, no recommendations were made by the committee. The history of the bill and a discussion of its interpretation in the form in which it finally became a law are contained in the May number of the "Massachusetts Law Quarterly."

GARDNER K. HUDSON,

Chairman.

REPORT OF COMMITTEE ON GRIEVANCES.

Four meetings have been held during the past year, at each of which a majority of the committee were present. Ten cases have been dismissed, five placed on file, one referred to the Bar Association of the City of Boston, disbarment recommended in one case, and one is still pending awaiting information from a district attorney who is prosecuting criminal charges against the lawyer complained of.

The case of Moses Entin of Fall River, referred to in our last report, came up again this year on the petition of Mr. Entin that the disbarment proceedings already authorized by the Executive Committee be suspended.

The Executive Committee referred his petition to this committee for action and two meetings were held at which the matter was fully gone into at length.

At the first hearing Mr. Entin was present and told his story; and a petition signed by a number of members of the Fall River Bar Association together with several letters from prominent members of the bar were presented in support of his request.

It appeared that, after offering a bribe to an examining physician to reject a client drafted under the Selective Service Act, Mr. Entin repented of his act, withdrew his offer and returned the money furnished by his client to the latter. He was, however, arrested, pleaded guilty to an offense under the Act and was sentenced to serve one year in the Plymouth jail. He had served his sentence, reduced by good behavior; and it was his assertion, apparently believed by his supporters, that he had learned his lesson and would henceforth live up to a high standard of professional ethics. Through inadvertance, the Fall River Bar Association was not notified of the first hearing. The committee, in the belief that the bar of Fall River, who ought to know Mr. Entin well, was disposed to give him another chance, voted in favor of suspending the disbarment proceedings provided that the members of the local bar did not object. Notice was sent to the Fall River Bar Association accordingly and a reply received including resolutions passed unanimously at meetings of their council and association respectively which insisted upon a vigorous prosecution of the disbarment proceedings; and in default of which that association, as stated, would itself initiate disbarment proceedings.

The names of several of the signers to the petition previous-

ly presented to the committee in behalf of Mr. Entin appeared as supporters of the later resolutions.

At the final hearing, after the receipt of this communication, the committee voted to proceed with the disbarment petition.

This committee has consistently declined to take jurisdiction of any complaints brought against Middlesex County or Suffolk County lawyers, where the active grievance committees of the Bar Associations of the County of Middlesex and of the City of Boston respectively handle all such matters.

As to the other counties of the Commonwealth it was supposed that the local bars preferred to have complaints heard by this committee whose membership made up from the state at large would be less liable to be swayed by local prejudices or intimate professional relations.

We have found, however, on a number of occasions that complaints brought to our attention, had been previously heard and determined by local grievance committees; and, in all such cases, have declined to go forward.

In view of the attitude of members of the Fall River bar in the Entin case and of the other instances to which we refer, it would seem advisable to have some uniform rules of comity or procedure agreed upon between the local and State Bar Associations regarding the handling of complaints.

Your commitee would suggest this as a valuable topic for discussion at the present session. While this association has no authority and cannot legislate for the local associations, it might be possible to negotiate with them through some special committee or otherwise in the interest of harmonious and uniform methods. Perhaps the special conference committee on grievance matters appointed at the last annual meeting may present some suggestions along this line for your consideration.

At the beginning of the year Reginald Heber Smith, Esquire, resigned as secretary of this committee and was succeeded by Philip Rubenstein, Esquire.

The committee has been exceedingly fortunate in having a succession of secretaries who have each given so much faithful and efficient service in that office. By their uniform discretion and tact the general meetings of the committee have been freed from the consideration of those trivial and groundless complaints and "collection agency" matters which always

form the larger portion of the matters brought to the attention of the secretary of this committee.

A communication dated September 29, 1919, and addressed by Hollis R. Bailey, Chairman of the Board of Bar Examiners, to Frank W. Grinnell, Secretary of the Association, enclosing a list of applicants for the bar and requesting information which would aid the Board in passing upon their moral fitness, was presented at the meeting of the committee held October 11, 1919.

The secretary was instructed to obtain reports from the various members of our committee located outside of Suffolk, Middlesex and Norfolk counties; and that, as to applicants from these counties, the secretary of the bar examiners be referred to the Local Bar Associations.

It might be well for this association to take up the question of comity and procedure in regard to this matter also.

While the grievance committee perhaps comes nearest in its functions of any of the standing committees to the prosecution of such inquiries, there appear to be at least three strong objections to adding such duties to those with which it is now charged.

First: The jurisdiction of this committee is very strictly defined and limited by the Constitution to the consideration of written complaints against members of the bar; and so, while members of the committee can individually assist in that very practicable and necessary work, as a committee no action is open.

Second: The field is large and the necessity is plain that the investigation be made by men thoroughly acquainted with the local reputation and standing of those recommending the applicants as well as the latter themselves.

Our committee is composed of fifteen members from the Commonwealth at large; an average of just about one man to a county.

A proper discharge of this function by us would seem a practical impossibility.

Third: Certain of the local bar associations are now handling this matter, and duplication of the work on our part would be useless.

I am not familiar with the methods adopted by such local associations other than in the County of Middlesex.

The system adopted there has been in successful operation for some years; and, wherever conscientiously administered, would seem near to the ideal.

In that county a committee is appointed in each of the seventeen districts into which the county is divided for that purpose. Each district is composed of a single municipality or a small and contiguous group. Thirty-four members of the bar thus serve, each in his own locality; and it is possible to get fairly complete and accurate information through them in regard to the moral fitness of all applicants living in their district.

If a substantially similar system is now, or will be, in operation under the auspices of the county or city bar associations throughout the Commonwealth, it would seem to be a most efficient and sensible method of handling the situation.

The matter involved is of too vital importance to be handled in any but the most efficient method possible; and should be committed only to those who can act upon the fullest knowledge and are able and willing to give their best service to protect the bar and the public by prevention rather than punishment.

FRANK M. FORBUSH,
Chairman.

REPORT OF THE COMMITTEE ON LEGAL EDUCATION.

The Committee on Legal Education in its report submitted in 1916, said:

> "Your Committee during the past year has taken no action. This has been due to the conviction that the occasion was not suitable."

In the following year the committee reaffirmed this statement. No written report was submitted in 1918. Your present committee, following the example of its predecessors, reports that it has taken no action during the past year. In the opinion of the committee occasion for action has not arisen. Your committee has some suggestions under consideration and asks leave to submit a written report at some later date.

SAMUEL C. BENNETT,
Chairman.

DISCUSSION AS TO MASTERS AND AUDITORS.

THE PRESIDENT.—There is a special subject for consideration in connection with the investigation being conducted by the Judicature Commission.

MR. GRINNELL.—Mr. President, perhaps I might say that the chairman of the Commission, Judge Sheldon, unfortunately could not be here. He expected to be present, but he had a very heavy cold.

Two of the Commissioners, Mr. Nutter and Mr. Greene, are here. The reason this subject was set for discussion at this meeting was that as there was to be a gathering of members of the Bar from different parts of the state it seemed a good opportunity to let them make suggestions to the Commissioners and for the Commissioners to hear the discussion. I do not propose to take part in this discussion. Being secretary to the Commission, I am merely here to listen and convey the result to Judge Sheldon later.

The subjects stated in the notice of the meeting were mentioned to focus attention on those questions, without excluding others. I have a communication addressed to the Commission from Henry F. Hurlburt, Esq., and as he was not able to be present today, in order to start the discussion, I will read what he says.

SUGGESTIONS OF HENRY F. HURLBURT, ESQ.

DEAR SIRS:

Under the present system of appointment of masters and auditors and hearings before them, much dissatisfaction has arisen. Too often a case is sent to a master or an auditor where the court should not do so.

At present if the parties cannot agree upon a master or an auditor, the court will appoint one. It often becomes a matter of strategic effort for opposing counsel to select some one who they think will be kindly disposed either to their side of the case or to the counsel in the case, and it is a notorious fact that efforts are made to select a master or an auditor who is friendly to one counsel or the other.

The court often appoints an auditor or master who is unfitted by reason of lack of legal attainment or good sound judgment. It seems to me that there ought to be throughout

the state a list of members of the bar, prepared by the Supreme Judicial Court, to act as masters and auditors, and I would abolish the term "masters" or "auditors," and substitute some title which would designate their appointment by the court, such as "Commissioners" or "Assistants to the Court," or any other dignified title.

I would recommend that this list be prepared by the Supreme Court in the first place, because many of the masters' reports go before that court. Many attorneys appear before that court and it has an opportunity of sizing up the mental capacity of men who have appeared before it, and their work, better than the Superior Court. It does not follow that a trial counsel who frequently appears before the court is the best man to act as master or auditor. A master or auditor requires training, and sound legal attainments, and should be as free from influence of counsel or parties as a judge himself.

This list prepared by the Supreme Judicial Court should be the list used by the Superior Court, and cases in which a reference is necessary should be sent in the order of the names of the masters or auditors on the list. Counsel should not have an opportunity of selection, the presumption being that all of the men so appointed would be fit and proper persons to hear the case.

After the case has been referred, hearings should begin by order of the court within a stated period. The Commissioner or Assistant should be provided with quarters in the Court House and should at once begin the hearing of the case at the time fixed. These hearings, unless for cause shown, should be continuous, the same as a trial in court. At present the courts do not recognize engagements before a master or an auditor. I see no reason why such engagements should not be recognized by the courts just as though the counsel were actually engaged before such courts. I suggest that after the arguments are made, the Commissioner or Assistant be obliged to complete his findings and report to the court within sixty days, the case then to take its place upon the trial list without either party being obliged to have it placed on the list. If it is a case in equity, objections can be argued before that court at once, and the court can determine whether to remit the case for further hearing and if it should, then the hearings should begin immediately before the Commissioner or Assistant, who

should file his supplemental report within ten days of the close of the hearing. If the Commissioner should fail without cause to file his report within the time alloted, the court should have the power to strike his name off the rolls of Commissioners or Assistants, not to be placed upon such list again. We have many men at the bar competent to act as Commissioners and Assistants, who do not frequently appear in the trial court, and who have judicial attainments sufficient to occupy a position on the bench, who could undoubtedly be selected to sit as Commissioners or Assistants to the Court with more satisfaction than under the present method. It is a crying disgrace the way reports of some masters are delayed. One attorney I know of has frequently been appointed as master by the court, and has frequently been selected by attorneys, but his other business is so large and important that he is unable to give his time and attention to such matters, and hence great delay. I know it is within the power of counsel to apply to the court to compel the master to file his report within a certain time, but counsel are averse to do so.

I would not have a *trial counsel* act as Commissioner or as Assistant,—unless such Commissioner or Assistant might be a man who may occasionally have one or two cases that he has to try, in which event, if he is in the midst of a hearing, he should apply to the court to be relieved pending that trial, and upon the completion of the trial, resume his hearings. If our Supreme Court after hearing arguments on questions of law can, as they frequently do, write opinions inside of sixty days, I see no reason why a master or an auditor should not report his findings within that time.

There should be rules and regulations prepared by the court governing hearings before such Commissioners or Assistants, which should be strictly adhered to. It has gotten so now that many cases are sent to masters or auditors for the purpose of pigeon-holing them for delay.

There are many cases now sent to a master that ought not to be sent, and the court at the present time is prone to eliminate work by so doing. I have known the ordinary land damage case to be sent to an auditor; and the construction of a will to be sent to a master.

If a long account is presented which on the face of it appears to be a proper case for an auditor, the court should in-

sist upon the defendant, if he is the one who applies for the auditor, setting forth what items he disputes, and that he by affidavit set forth his reasons for disputing each of the items, for it often appears when a case is referred with a long list of items, that the controversy is centered on one or two, which could be disposed of by trial before the court or jury without an auditor. It is for that reason the attorney contesting the bill of particulars should be compelled to specify what items he disputes, and his reasons. The court can then intelligently determine whether the case should be referred.

HENRY F. HURLBURT.

MR. WILLIAM R. SEARS of Boston.—Mr. President, I feel, in the presence of so many men who have had much greater experience than I, a little hesitation in expressing my own views. But there are, I think, one or two aspects of the administration of justice through masters—confining the discussion to the equity side of the subject—which should be radically changed. Of course, as Mr. Hurlburt says, there is no question that there are intolerable delays. Whatever we as members of the bar may feel about it, our clients have only one opinion. They resent the time that it takes, the interminable postponements, the long time that the auditor or master takes in the preparation of his report, and then the long time that elapses after the report is finally filed before the client feels that he has got anything tangible in the shape of a decree.

There is another objection, perhaps a corollary to delay —and that is the complexity and technicality of the procedure involved. The settlement of objections, of exceptions, of motions to recommit, all involve great delay and also require such a knowledge of practice that I venture to say few lawyers are certain at times just what the procedure should be. I know of two cases recently, not cases in which I have been counsel, but where the counsel in the case was an equity lawyer of great experience and wide knowledge, and yet, in the opinion of the Supreme Court, the course that he took was wrong, so that in one case the merits of the case were not decided by the court and in another case they were only decided by the court (passed upon them simply) by way of *dicta*. Now that is an important situation.

There is another objection, and that is that under the prac-

tice a master makes certain findings of fact which may not cover the entire case. A member of the Worcester bar told me last night that he was the master in a case which came up before the court after he filed his report, and the judge said to him, "You didn't make any finding on a certain point." "No," he said, "I did not, because, having studied the law carefully, I concluded it was not necessary to make a finding on that point." The judge said, "You need not bother about the law, but find the facts; I have supplied that deficiency." In other words, the judge, without having seen the witnesses in the case, had drawn an inference from the facts found; and I know of one case where the inference drawn by the judge was directly contrary to what the master himself said he would have found if he had found the facts in issue.

What is the remedy? I submit that the remedy is to give the master greater power than he has at present—to give to the master the same power that a judge would have, sitting in the case. Instead of dividing the responsibility (a division of responsibility, by the way, which no great business concern could last under) between the master and the court and saying to the master, "We trust you to find the facts, but we will not trust you to apply the law to those facts," although the most careful study must be made to determine what is essential to find as a fact—the remedy is to allow the master to find both the law and the facts, in other words, to report his judgment as to the final decree.

The facts of the average complicated case are far more difficult to deal with than the law. I think it is the experience of most counsel who have tried complicated equity cases that there are a great many lawyers who can give expert opinions on theoretical questions of law submitted to them where the facts are found, but it is very rare to find a man who can take a very complicated state of facts and from the testimony of witnesses, from immense numbers of documents, running into thousands in some cases, can accurately and precisely find the facts. In other words, the court is now entrusting to a person whom it appoints as master the far more difficult task, yet reserving for the court the application of those facts to the law. And whereas a master who is steeped in the case, who has studied it for months, who knows it in every aspect, can only make his report, yet a judge who has heard the case

argued, perhaps for two hours, possibly for a day, is supposed to know infinitely more about it than the master and to enter a final decree.

Why should not the master have the power of reporting a final decree? If he is given that power he becomes more of a magistrate, and is more likely to deal with the question of delay than is a master who simply is delegated by the court to do certain things and then has no real responsibility as to results.

One other thing. It seems to me a large part of the criticism as to masters, (and it is equally true of auditors), comes from the fact that there is no supervision by the court of what the auditor or the master is doing. The court appoints a master or an auditor; that is the end of it. No one knows what he is doing. The master may delay; counsel may want to have the case decided. It is always embarrassing to go to a man, who you hope is going to decide a case in your favor, and tell him to hurry up, or that your client is all out of patience. That should be a part of the duty of the court. There should be some one, it seems to me, whose duty it should be to check up the work of the auditors and masters and see that their duty is performed. I believe that in that way a very large part of the delay which accompanies almost every master's or auditor's hearing could be dispensed with.

Mr. Frank M. Forbush of Newton.—I listened with great interest to Mr. Hurlburt's letter and the very valuable suggestion that he makes in it. I presume that nearly if not all of us have frequently sat as masters and auditors, and we find often, as one of the judges said to me, that men are appointed simply because they are agreed upon between the counsel, who make reports which are unintelligible and of very little assistance to the court in coming to a final decison. So that Mr. Hurlburt's suggeston that men who have had experience at the bar and men who have had experience in hearing cases should be placed on some list and selections made from that list, perhaps by order or rotation or otherwise, would seem to be reasonable and practical.

There are, however, from the standpoint of the man who might be on the list, some practical difficulties. In the first place, the master or the auditor not only hears the case but when that case is finished he is charged with the duty of mak-

ing an intelligible report covering all matters in controversy, finding all necessary facts upon which the court can properly apply the law—and he is not to find any more, or he will be criticised by the court for bringing into his report immaterial matters,—and under the rule that report must be prepared within a specified length of time. To do that work properly the master or the auditor must sit down quietly by himself. It can be done, I find in my own experience, only very rarely in the ordinary business day. The result is that if I am trying to make up a report I sit down in my office in the evening, with nobody to disturb me, with all my lawbooks round me and all the exhibits in the case, and write out a report which I feel may measure up to the standard which the court wants. That takes time, and while the county pays for it at a specified rate, it is a question which ought to be considered in making up such a list as is now suggested whether the compensation now allowed by the Court should not be materially and very largely increased. If a man is to take these cases and to devote his time to them—and such a list would mean that a man placed upon the list would find the larger part of his time occupied exclusively in that line of work, he would be practically debarred in our larger counties from the ordinary practice of the law and would have to concentrate himself on this one line,—then that work ought to be properly paid for. I think that those matters that should be taken into consideration in attempting to work out a practical solution of a situation which now presents a good many difficulties. The judge sitting in the Superior Court can take up a matter in equity with an intelligible report before him and make a decree or give a memorandum to his clerk of what kind of a decree should be entered, after the counsel, of course, who are successful in the litigation have presented a draft for approval—he can do that in a very short time. But the man who sits and hears the case and has to prepare his report has got to put a vast amount of time and ingenuity and thought into drafting a proper report to prepare for the court. And, under our present practice, the report must be in the alternative in case the court shall find that the master's view of the law, upon which, had he been sitting as a judge, he might have decided the case in five minutes, was erroneous, and the court wishes sufficient facts before it to make the proper decree or make proper findings in

the case, according to whether it is an equity or a law case. For instance, in one matter that was referred to me there were seven mechanic's lien cases and also a suit on an account annexed, all embracing the same matter. The mechanic's lien cases were an attempt on the part of an architect to recover under the mechanic's lien under such circumstances that according to the decision of our Supreme Court he had no lien whatever. As a judge I could have decided that as soon as the plaintiff's evidence was concluded and could have made the briefest kind of a memorandum to satisfy the rules of the court. As an auditor I had to go on with it, assuming that the court might say in spite of the decision of the Supreme Court that I was wrong in coming to the conclusion that I did on the evidence and finding for the defendant, and find all the necessary facts on which, if the court decided I was wrong, they could then find a proper amount of damages in each of these cases. There being seven houses, I had to make up seven reports as well as an eighth report in the action at law, the whole eight having been heard together.

Those are some of the practical difficulties for which, if auditors are selected by this method, they ought to be properly compensated. And it should be taken into consideration that on such a list, unless it is made a very long one, the time of the men selected would be almost entirely taken up with hearing cases.

One other matter—frequently counsel come before an auditor or a master and say, "We cannot afford to pay *for* a stenographer." My response to that always is: "Well, if you depend on me to take longhand notes you will have to spend more time on your trial, because I cannot keep up with a shorthand reporter; and furthermore, I won't guarantee to you that I will state with absolute accuracy the facts in the case. I will do the best I can with what fragmentary notes I can take." If such a system as this is adopted, then certainly the county, besides providing the room for the hearing, should see that a stenographer is appointed as competent as any other court stenographer to take the evidence and render transcripts to counsel and to the presiding commissioner, referee, auditor, master, or whatever you may call him under the new system.

Mr. Hollis R. Bailey of Cambridge.—Mr. President, as to the point suggested by Mr. Sears, of allowing masters to de-

cide the whole case as well as find the facts—I began hearing cases as auditor and master perhaps thirty years ago, and for twenty years there was no clear expression from the court saying it was improper for the master to make rulings of law as well as findings of fact, and I, rightly or wrongly, conceived it was the duty of the master or auditor to assist the court all he could, and so it was my practice to make rulings of law as well as findings of fact, and sometimes I put in a reference to one or two cases which seemed to me important, so that when the case came before the Superior Court for trial by jury the judge would have right there at hand a reference to look at. I found that some other auditors and masters did the same thing, so that I was not alone in what I did. And then I found that the Supreme Judicial Court finally in one or two opinions said it was not proper for a master or auditor to do anything but find facts and it was out of place for him to make rulings of law. I think that that is wrong. I think that the court needs all the help it can get and should have all the help it can get. It is well understood that any rulings of law made by a master or auditor are advisory only, not binding; and yet the court, I believe, is often very much helped, because as Mr. Sears has said, the master or auditor has the atmosphere of the case; he has thought about it days and nights for a long time. He may not be right in his law, but there is considerable chance that he will be, because he has had more time to consider it and look it up, and has heard longer arguments by counsel. So that I think that that change in the practice, which has come about within the last ten years, of confining masters and auditors to simply finding facts is not a good practice, and if we were to go back to the old way it would be a distinct gain.

There is one other thing which, in a way, is connected with what our president said last evening as to the public disfavor in which the courts and the judicial system are held, especially industrial disputes. In Massachusetts, differing from most of the states and different somewhat from the practice of the Federal courts, findings of a master are given the same weight as the findings of a jury and they are not to be overturned by the court except on the same ground on which they would overturn a verdict. You know that often cases involving very large amounts are referred to masters. The client has no

choice; the court will not frame a jury issue for him, and the case is referred to a master and the master makes his findings of fact and they are conclusive. Thirty years ago that was not serious, because thirty years ago it was a matter of common practice to get an order of reference in which the master would be ordered to report such portions of the evidence as either side might request, and in every case of importance one side or the other requested him to report all the evidence, and so the case finally came before the court with all the evidence, so that they could to a certain extent review the master's findings of fact. Then that put a great burden on the court to read voluminous evidence, and in the last ten years it has been practically impossible to get any such form of order of reference, and if counsel go to the court to get an order that the master report all the evidence, almost always it is refused.

I wonder if that is right. One good that comes from a jury trial is that it keeps the administration of justice in a certain way close to the people. They say it is important in a democratic government to keep the government close to the people so that people will feel that it is their own government and they can change it if they want to. If we should undertake to do away with a jury trial I suppose there would be a great popular clamor that we were removing justice away from the people, and it would bring the judicial system into much greater disrepute or disfavor than it now is. I believe we should provide in equity cases more frequently for the reference of questions to jury trial. This is done in will cases now almost as a matter of course. It is easy now to get a jury issue framed in a will case and I have had jury issues framed in plain equity cases. I believe that if you could get issues framed rather freely and sent to a jury you could do away with the delay which almost of necessity happens where there is a trial by a master. Then of necessity the case would have to be tried once for all right away and you would get a speedy result. Those jury findings would not have any greater weight than the findings of a master now have, but they would be much more expeditious. However, that is a little to one side. I think that the findings of a master ought not to have that conclusive effect which they now have. They should be advisory to the court and there should be greater freedom in allowing the master to report all the evidence. In

the United States court, as you know, it is common for all the evidence to be reported, and you have bulky reports, but nevertheless you have got the whole case before the court and you do not lose your case because the master had overlooked the importance of some of the evidence and nobody realized the importance of certain portions of the evidence so they never got it before the court.

Those two things—a greater use of jury trials in equity cases for the sake of speed, for the sake of greater satisfaction to the public—I think that is all important and might well be considered.

And then the further question whether the reports of masters might well be made advisory instead of conclusive as they now are.

Judge HENRY T. LUMMUS of Lynn.—Mr. President: Mr. Bailey's remarks about the necessity of trying to give satisfaction to clients in masters' cases which he proposes to insure by resort to what seems to me to be the cumbersome method of reporting the evidence, lead me to think that the right of counsel and parties, subject to the control of the court, to choose the master in certain cases is a valuable right and lead me to question somewhat the advisability of adopting Mr. Hurlburt's suggestion that the choice by parties and counsel of masters should be abolished and that cases should be referred, in order, to the next one on a list of masters selected by the court without reference to the question whether the master is satisfactory to the counsel and parties and without reference to whether the case is one of a sort in which that master is reputed to be especially efficient or not. And I think the very element of truth in the thing that Mr. Bailey has pointed out is one reason why we should go slowly in the establishment of the small and select body of masters who, as Mr. Forbush has pointed out, would practically become judges, who would practically have to devote their time to the occupation of sitting on cases.

On the main question it has always seemed to me that the power to remedy most of the troubles lies in the court. We had a statute a few years ago which always seemed to me to be a feeble attempt to convert poor masters into good ones. I always felt that the good masters—the men of judicial attainments and judicial habits—presented the questions of law

and of fact fully and fairly, giving to the parties ample opportunity to test questions of law before the court without any regulation, without any statutory direction, as to the form in which their reports should be drawn. And I still think that if the courts would take a little more care to oversee the selection of masters by counsel, to make sure that cases were not sent to masters who were known to be dilatory, who were known to be lacking in judicial acumen, that most of the evils that have been mentioned would be obviated. The remedy, it seems to me, is not to put the system in a strait-jacket, but to bring proper influence to bear on the courts to be more careful in the administration of the present system so far as the selection of masters is concerned.

The delays that take place in masters' cases, so far as I have seen them, have been very largely delays caused by counsel and not delays caused by masters. In my own experience I have been struggling now for about six weeks to find a day to finish a certain case in which I am sitting that will not interfere with engagements of busy counsel, and I have so far been unsuccessful; and I think that is not an isolated example.

Mr. Hurlburt's suggestion, however, that hearings before masters should be given the same standing as hearings before courts seems to me a perfectly proper one, and if that were done I think that fully three quarters of existing delays in masters' cases would be obviated. I do not believe that more than a quarter of the delay results from undue delay by the master in preparing his report.

The matter that has been spoken of, of the legal effect of masters' reports and the legal powers of the master, seems to me of importance. Rumor has it that when, a few years ago, the Supreme Judicial Court laid down specifically the rule that a master should not concern himself with matters of law but should confine himself to reporting facts, one of the most experienced equity judges of the Supreme Judicial Court was not in sympathy with that declaration of the law and announced himself at several times in conversation at least as holding the belief that what we need to assist in the administration of justice are not masters as the court defined the word, but vice-chancellors, who would find the facts and advise as to the law subject to the revision of the court as to

law questions. And it is not entrusting, as it seems to me, any undue powers to the masters to give them the power to report on the law, because the final decision of that law is reserved to the court.

The criticism that too many cases are referred to masters seems to me to be well founded. I think too small or too unimportant cases are referred to masters. I once was a party to what seemed to me a ridiculous illustration of that, when a case in my local court which had been heard by one of the special justices was appealed and referred back to me as auditor. One remedy for that situation—which is the situation of referring too small or too unimportant cases to auditors—one remedy for that situation is to extend through the Commonwealth the civil practice now prevailing in one of the municipal courts with the result that these small building contract cases and automobile repair cases which involve an extraordinary amount of accounting and which on appeal involve a considerable amount of time on the part of the Superior Court or a reference to an auditor—those cases under that plan never would get to the Superior Court and there never would be any occasion for referring them to auditors, but, on the contrary, they would be disposed of cheaply and expeditiously, with ample security for the saving of proper law questions through the working of the one-trial system, which I trust will shut off that source of protracted small litigation.

The suggestion of a bench of masters to whom in rotation should be referred cases arising in the courts does not appeal to me. It would shut off, in the first place, from sitting as master many of the most eminent men whom we now occasionally have sitting as masters, because those men could not afford to become professional masters at any rate of compensation that would be likely to be paid. And while now they are occasionally called upon in very important cases, their services would no longer be available.

That plan would also tend to crystallize the system so that young men who now occasionally have opportunity to sit and to establish a reputation for judicial capacity would no longer have the opportunity; and the first lot of masters selected, while the selection might not be absolutely final, would nevertheless control the work of that sort for many years to come.

It would shut off also many men who may not be of the first rank in the profession, but nevertheless are thoroughly competent masters, who by reason of holding some other position or by reason of their private engagements would have to give up sitting as master, which they do to the general satisfaction of the bars of their counties.

It seems to me, on the whole, that some method of improvement in the quality of masters should be made by action of the court, by greater scrutiny and care on the part of the court, rather than by what seems to me the straitjacketing that Mr. Hurlburt proposes.

MR. PARKER of Westfield.—Mr. President, this is interesting to me, because from my entrance upon practice it has seemed to me as though the master and auditor idea is capable of continuous misunderstanding. Always somebody is criticising it. Practically, it is said to be a good system, but always there is something wrong about it.

The best suggestion that I have heard was made by the man who is perhaps the leading master and auditor in Hampden county. He thinks the only way is to do away with the whole thing, and he has expressed himself very thoroughly in reference to the matter. I have felt the same way myself. I never could understand why the Superior Court is so continually ready to refer things to masters and auditors that they could handle themselves.

Now I had this experience myself. I had an injunction, and the judge who granted the temporary injunction ordered that it should be heard before the next jury waived trial session in Springfield, and he gave a special assignment and we actually got it heard, which is rather an unusual thing up there in the jury waived session, to get anything heard. It came up and the judge did not know exactly what the case was about, and it went on for about an hour and he said, "If I had known what this was about I wouldn't have heard it at all myself, I would have referred it to a master." The case lasted exactly four hours with argument and everything. He made a decision right straight away and the whole thing was cleared up within ten days. If it had been referred to a master it would have dragged away for weeks, it would never have been as satisfactory to our clients, would never have been as satisfactory in general at all, while the court was able to

handle the case more quickly and expeditiously and to much better advantage than it could possibly have been handled by a master or auditor.

Now it seems to me that if in Hampden county we could have a jury waived session almost continuous, there would be almost no need of masters and auditors. There are so many of these cases that when they are tried before a judge are tried so expeditiously, there would be no delays; they go right on with the evidence and they are through quickly, whereas if they go before a master or auditor they drag along. I don't know what the technical difficulties are, but as far as practical results, as far as satisfaction to our clients, as far as getting things done expeditiously, the less we can have of the system of masters and auditors, and the more we can have with the court itself actually handling these things, the better we get on, and we will make progress that is definite and constructive. This other contrivance that we continually talk about, as far as I can see, is simply tinkering.

THE PRESIDENT.—I am sure the meeting would be glad to hear from Mr. Hammond of Northampton, after his long experience at the bar.

MR. JOHN C. HAMMOND.—I had not expected to say anything on this subject, and if I do make any suggestions it will be that open confession is good for the soul of a lawyer and that a great part of these troubles, not only in masters' and auditor's cases but all others, lies in the procrastination of the lawyers themselves. I have seen the first week of a term, jury waived or even jury trial, going for nothing—then the second week, the third week, tomorrow, next day—and the time of the court is wasted. Now when you come before masters and auditors the master does not feel so much like being schoolmaster as the judge does, and he gets a day set for a hearing, the parties come in and they sit for an hour or two, and one counsel or the other says, "Well, my witnesses are not ready; let us take it up another day." Lawyers themselves press on a master or an auditor to delay, delay, delay, and it does come to a position where much more of the work of the masters and auditors could be done in the courts. When I first came to the bar there was much less of referring cases to masters and auditors than there is now. Of course, the courts were not so crowded with work. But there is need of a

remedy, and the thing most dwelt upon, that a master is handicapped because he is not expected to make his rulings of law at all, or else say, "If the law is this way my findings are so, if the law is the other way my findings are so"—that is all wrong, and I know some of the judges think it is wrong, and possibly that might be corrected by a change of the rules of the court if they saw fit.

I have no concrete suggestions to make on the subject, and the one thing I rose to say was that in my observation the habit of the lawyers of using the Spanish expression, "Mañana,"—"Do it tomorrow"—is responsible for a good many of the law's delays.

Mr. Martin Witte, of Boston.—It requires no extended argument, I submit, to establish the point that masters and auditors have become permanent fixtures in the machinery of the administration of the law. Automatically their functions are broadening. And the time is ripe to formulate plans and rules which will expedite their hearings and increase their utility.

It has been suggested by the last speaker that counsel are largely responsible for delays in hearings before masters and auditors. As to that there seems to be unanimity of opinion. Usually appointments are made as a result of the confidence that counsel may have in given selections. When an appointment is based upon agreement of counsel the designee is prone to be over kind and deferential to counsel. While judicial courtesy is always desirable we do not control counsel with that hand of rigor and discipline that the court would exercise. That is one of the evils that, I think, could be corrected by the adoption of some such suggestion as Brother Hurlburt has made. As soon as you have permanent masters and auditors you will have men who, perhaps, will not have those delicacies of feeling about counsel who are engaged in the case; and will, if they are given somewhat greater powers than they now possess, be enabled to go on expeditiously with their cases and hold parties, as well as counsel, within bounds. For, if counsel are largely responsible, as we agree, they must be curbed and the only way that that can be done, as I view it, is by giving the master or the auditor a free and independent hand to act, not autocratically, but with that same degree of firmness and finality with which the

court itself would act under similar circumstances. Existing legislation and rules of court will not, of themselves, suffice while appointments are made in pursuance to present practise.

With reference to the suggestion made by Judge Lummus that the establishment of permanent masters and auditors would have a tendency to stifle the ambition of men outside of the group or perhaps preclude the sitting of men in whose ability and fairness we have the utmost confidence,—perhaps the most direct answer to that suggestion is that there are many members of the bar who would be well fitted to act as judges, but the latter are limited as to number. Further in that respect, the time has come when we must recognize that there ought to be greater coördination between the courts and their masters and auditors. The latter ought to be as stable and untrammelled as the courts themselves. Spasmodic appointments, however worthy, cannot accomplish that result.

It is a very difficult thing for courts sitting only occasionally as they do in certain sections of the State to intelligently pass on the personnel of a proposed appointment.. They are not in most instances familiar with the qualifications or lack of qualifications of the men who are suggested.

There is this further difficulty: However much we may deny the facts to ourselves it is nevertheless true, that when a case which is proper for an auditor or a master comes into our offices and both sides have come to the conclusion that there ought to be a reference, immediately there ensues considerable mental fencing. Out of pardonable zeal for our clients we instinctively suggest men who we feel are not going to be unfavorable to us. That, of course, is not quite the proper way to approach the selection of a judicial or semi-judicial officer; but we know that we do think along those lines; and when we are negotiating for such an appointment our justification is that it is part of the general contest of wits involved in the trial of the case. That is another evil, if I may so call it, which would be eliminated by the plan proposed.

In such negotiations unfortunately very little heed is paid to the experience and capacity of the auditor or master and that brings us to a more serious phase of this question. The

mere fact that the two opponents agree upon him does not justify the court's appointment. The court is almost powerless, in that usually it does not know the man and assumes that counsel are acting in good faith with a view to assisting the court in making a reference to a proper designee.

Brother Forbush has said, and I agree, that the handling of cases by auditors and masters involves to a large extent rather technical procedure and I go further and say many mistakes are possible and frequently injurious; unintelligible reports are filed; reports which do not seem to have a concept of the issues raised; reports which do not concisely and clearly set forth the facts found; reports which dodge evident objections or purposely cover them up with nullifying findings; many other instances of difficulties with reports could be cited.

Permanent masters and auditors would result first in the establishment of an institution which would at least shortly after its inception, if not immediately, produce officers of the court who would specialize in that character of work and who would gradually assume a more judicial attitude. While the master or auditor is but an adjunct of the Bench, yet he has for a long time been approaching the judicial realm and it would seem that greater harmony would result from a closer relationship and understanding between the Bench and its masters and auditors, if they were given more judicial standing and recognition. It would follow that they and their rulings would be respected throughout their sittings as well as after their reports are filed.

Mr. Sears suggests that masters be vested with power to frame decrees. I cannot go so far as that; but in view of the fact that our practice in equity now contemplates every kind of relief which may be justified under the frame of the bill and answer, where, among others, there is a general prayer, the master is in a peculiar position to be of great assistance to the court in framing its decree. It strikes me that if an innovation could be made whereby the master should make recommendations as to what he conceives to be the real difficulties between the parties and how they can best be remedied and by what form of decree or order, then the court, without necessarily being bound thereby, would have the connecting link between itself and the master. In other words, when

the master abruptly stops at the finding of facts and the court get no other conception or view of the case than that, except for the light, if any, the pleadings may furnish, there frequently results a sort of hiatus which compels the court to conjecture its way to a conclusion as to what disposition to make of the report and of the questions, if any, raised by it, and as to the nature of the decree. The atmosphere of the case has not been wholly portrayed. So that if recommendations are made by the master we would be getting nearer to his effectiveness.

Then there is the economic angle. The aggregate expenditures for masters and auditors on an average for the past five years in the County of Suffolk has been $60,000. per year. So that Mr. Hurlburt's estimate of fifteen permanent appointees in Suffolk, strikes me as approximately correct. The remaining counties should be allotted proportional appointees with provisions for exchanges and transfer when necessary or advisable. But I still feel that the appointment should be of such a character as to carry with it a flat stipend per annum, even if this require appropriate legislation. On the present basis of compensation the auditor or master receives $25. per day of six hours. (He would be expected to devote about one-half of his time to the work, the other half to be allowable to his private practice. That would approximate 150 days of actual service at least. Multiplying $25.00 by 150 days the result would be approximately $4,000 a year. I believe, if men who are competent to do so, would dedicate themselves to this character of work, they would be fairly entitled to that amount of compensation and a fixed salary would have a tendency to free their minds from the restraint and misgivings to which the casual appointee is now subject. On the other hand, the courts ought to be in a position to demand and receive the priority of the time and efforts of the appointees. Thus the independence of the master or auditor would be assured and delays would be largely if not wholly eliminated, and general efficiency would be amost certain to result. The scheme might perhaps be more available if a system of rotation, subject always to the will of the Court, could be devised whereby the work would be equitably distributed and yet advance publicity as to the appointee be precluded.

We know that auditors are now hearing extremely involved issues; and that hearings before them are presumably very thorough. But where a jury trial is claimed in a case sent to an auditor, the assumption is that the auditor's report is needed to facilitate the eventual trial. Yet after a severe contest before the auditor, the report being filed and a long interval having elapsed, substantially the entire case must be retried. This is equally true of cases where jury trial has not been claimed. In view of the recent decision of our Supreme Court, which in effect treats the rule of the Superior Court providing for entry of judgment upon auditor's reports as being uncontsitutional, it would seem that, in the interest of expedition and efficiency, a constitutional amendment might well be considered which would make it possible, subject to reasonable conditions and limitations, to avoid duplication of trials of this character by some appropriate order of the Court without necessarily depriving the party or parties claiming jury trial of their right thereto.

There are conceivably many instances in which the right to jury trial is indirectly nullified by statutes or adjudications which are just barely within the limits of constitutionality, so that no hardship could result from the adoption of such a constitutional amendment. Tradition is the only obstacle to it.

I strongly urge the appointment or establishment of permanent masters and auditors however the system may have to be brought about, with a preference, of course, that the power of appointment be vested in the court.

Mr. Charles H. Beckwith of Springfield.—It appears to me that the only adequate solution of this problem is the increase in the number of Superior Court judges and the lengthening of the jury waived sittings in the various counties, and then the discontinuance of this practice of reference except in extraordinary and peculiar cases. Such a step would meet the problem, meet it fully, adequately, and it would not be necessary to have any constitutional amendment. Only two suggestions contrary to that view now occur to me, and it seems to me that neither of them is of great weight. One is the expense of the additional judges. While I have made no investigation as to the expense of auditors and masters, it would appear to me that probably it would be no greater expense

to the Commonwealth as a whole to have a few more Superior Court judges than to pay the expenses that the various counties are now paying for their auditors. But, of course, in any event that is a minor question. If the step would be an improvement in the administration of justice, more expense is not to be seriously considered. And as has been said here, if the suggestion is that a new set of judges be appointed, and if we are to have a list of approved masters in all of the counties appointed by the court, why, we are setting up really a new set of judges—if that is done, and these men are to have just odd jobs through the year and must practice law to earn their living, the present rate of compensation must be increased if we are to get the proper kind of men.

I see no reason and it does not appear to me to be sound to create an additional class of judicial officers when we can enlarge the Superior Court to meet the need and then get instruments which will be much more satisfactory.

Another suggestion in opposition to this view has been made, that if a case is heard by a judge of the Superior Court sitting as an auditor, and the law remain as it is, that that auditor's report shall be but a *prima facie* finding of fact, that when that report goes before the court, and presumably before a sitting of the court at which some other judge presides, perhaps the finding of a Superior Court judge on facts might unduly influence the jury in their determination of the facts from the evidence presented before them. But it appears to me that that argument is unsound. If the auditor is fit to be an auditor at all, why, his findings of fact ought to have as much weight with the jury as the findings of fact by a Superior Court judge.

However, we have been told here of the faults of the present system, and we all agree. I think that Mr. Hurlburt's letter is a line of thought in the right direction, but I think it is not carried far enough, but if it were carried far enough I think it would land us in the conclusion that the only solution of this problem, and the adequate and complete solution, would be the enlargement of our Superior Court in the number of its judges and the lengthening out and the increase in the number of our jury waived sessions, and then the doing away with out present system of references except in peculiar and extraordinary circumstances.

DOCUMENTARY EVIDENCE IN THE ENGLISH LAW COURTS.

MR. FRANK H. BURT.—Mr. President: In a visit to the London law courts many years ago I was impressed with the procedure followed there in the matter of the introduction of documentary evidence. It was so long ago that Lord Chief Justice Coleridge was on the bench and Sir Charles Russell (afterwards Chief Justice) was leading counsel for the plaintiff. The case was one in which there was a long series of letters and telegrams. We all know what that would have meant under our practice—letters shown one by one to the opposing counsel, then identified by the witness, then marked by the stenographer and finally read; then the production of the letter written in reply and the same steps followed with each exhibit, exhausting time and nearly putting the jury to sleep. In the English court the counsel on both sides had the full correspondence copied in their briefs. The plaintiff's lawyer called his client to the witness box and proceeded:

"Doctor, your name is so and so, and you live at such a place?"

"Yes, sir."

"You became a director in this company and subscribed for so many shares?"

"I did."

Leading questions on undisputed matters are apparently never objected to.

"And at a certain time certain troubles arose and rumors began to spread, which reached you?"

"Yes, sir."

"On the 6th day of June you wrote this letter"—reading in a letter from his brief.

"On the 7th day of June you received this telegram?"—reading a telegram.

"On the same day you wired in reply as follows"—And so he proceeded through the whole mass of papers, the witness merely nodding assent as each exhibit was read. Without wasting a moment the entire correspondence was brought before the jury in chronological sequence so that the full significance and bearing of each document could be under-

stood. Of course this was in a matter where there was no controversy over the genuineness or admissibility of the papers, and no chance for either side to gain a point by surprise. I was told that there was some method of procedure by which the letters were proved before a Commissioner in advance of the trial. It seemed to me that the system was thoroughly practical and that it avoided much of the delay and confusion that our method of introducing correspondence often involves.

OUGHT THE FULL BENCH TO BE REQUIRED TO GO CIRCUIT?

Whether the Supreme Judicial Court sitting as the court of last resort ought to go on circuit or to sit in Boston alone is a question on which it is possible that there may be a difference of opinion.

Whether that court ought to be required by statute to go on circuit is quite another matter.

And again it is quite another matter whether the full bench ought to make the particular circuit which it is now required by statute to make.

The present arrangement of the work of the Supreme Judicial Court sitting *in banc* hardly can be called a system. Twenty years ago there was a system for this work. What is in force today is an arrangement growing out of that system and a number of patchwork changes in it which have been made from time to time some by the legislature and some by the court.

The system in force twenty years ago was as follows: For the first eight weeks, beginning with the Monday before the second Tuesday in September and ending with the week beginning with the Monday before the first Tuesday in November, the court was required to sit in the seven counties of Berkshire, Hampshire or Franklin (treated as one county) Hampden, Worcester, Plymouth, Bristol and Essex. The sittings of the court for the commonwealth held for the counties of Suffolk, Middlesex, Norfolk and Barnstable were and are by statute to be at "such places and times" as in the opinion of the court shall be "most conducive to the despatch of business and to the interests of the public," subject to the provision of the statute that the first sitting of the court for the commonwealth shall be held in Boston on the first Wednesday of January.* The sittings in fact held by the court for the commonwealth under this provision of statute were as follows twenty years ago: Two weeks in November next after the

*NOTE.—The court for the commonwealth has always (so far as I know) begun its sittings for the hearing of arguments on the Monday following the first Wednesday of January. It is in consultation during the whole week beginning with the Monday before the first Wednesday in January.

sitting in Essex; two weeks beginning with the first Monday in December; three weeks beginning with the Monday after the first Wednesday in January; and four weeks beginning with the first Tuesday in March. These sittings and all of them have been held in Boston and nowhere else.

The assignment of the chief justice (who alone always sits as a member of the full court) sets this forth in a convenient form. The assignment of the chief justice for the law sittings of the court during the year 1899-1900 was in words and figures following:—

12 September, 2d Tuesday,	Berkshire	Law	(½)	1 week
19 September, 3d Tuesday,	*Hampshire and Franklin	Law	(½)	1 "
26 September, 4th Tuesday,	Hampden	Law	(½)	1 "
2 October, 3d Monday after 2d Tuesday of September,	Worcester	Law	(1)	2 "
17 October, 3d Tuesday,	Plymouth	Law	(½)	1 "
23 October, 4th Monday,	Bristol	Law	(1)	2 "
7 November, 1st Tuesday (or Wednesday after),	Essex	Law	(1)	2 "
13 November, 2d Monday, to Tuesday before Thanksgiving,	Suffolk, etc.	Law	(2)	4 "
4 December, 1st Monday,	Suffolk, etc.	Law	(2)	4 "
8 January, Monday after 1st Wednesday,	Suffolk, etc.	Law	(3)	6 "
6 March, 1st Tuesday,	Suffolk, etc.	Law	(4)	8 "
Full Court (16)	32			32 weeks

Each week engaged in hearing arguments in law cases will require *at least* as many more to write opinions.

It is stated in the assignment that each week engaged in hearing arguments in law cases will require "at least as many more to write opinions." And it will be observed that the work of the full court both that on circuit and that at Boston is computed on that basis. That is to say, so far as the assignments go no time is set aside for writing opinions in addition to that stated in the assignment set forth above. But it must not be supposed that opinions in fact are written on that basis. Ordinarily the full court when sitting at Boston hears five cases a day. Of course on some days they do not hear as many and on some days they hear more. But ordinar-

*The Court sits at Northampton in the *even* years and at Greenfield in the *odd* years.

ily each of the sitting justices gets one case each day that he sits. On the basis on which the assignments are made that means that the opinions are written at the rate of one a day. But there are many cases which cannot be written in a day and there are some which cannot be written in a week. In passing it may be said, however, that a great many of the opinions must be and are written in a day. If they are not the court would not and could not get through its work. The additional time necessary for writing their opinions is taken by the justices from time not set apart for that purpose.

If the methods of traveling from place to place were the same as those which obtained a hundred years ago the full court ought to go on circuit. If the question were whether the judges ought to take horse and chaise and make a circuit of the out of town counties or whether the lawyers in those counties ought to take horse and chaise and go to Boston no question could be made as to the wisdom of the full court going circuit. When horse and chaise was the means of traveling from place to place the ideal arrangement was for the justices to drive to Berkshire in the early days of September, sit there as a full court, while there write opinions in the cases which they had just heard argued; then drive to Franklin or Northampton sit there and write opinions in the cases heard there; then drive to Hampden, Plymouth, Worcester, Bristol and Essex doing the same in each county.

But the horse and chaise is not the method of travel today. Today the justices travel by rail. They go to Pittsfield the day before and go home the day of the sitting after the consultation which always follows a day's sitting in court. That means two half days are spent in traveling—* the equivalent of one whole day—whenever the full court sits in Berkshire. It takes substantially the same time to go and come when the court sits at Greenfield or Northampton. Springfield is only two and a half hours away and so less time is taken up in traveling when the court sits there. The time spent in going to and from Worcester and Taunton is less and not of serious consequence.

It is not a good use of the court's time to make it devote two or three days in traveling to do two days' work sitting in

*NOTE.—This is written on the assumption that all the justices live in Boston. Of course that is not the fact and allowance is to be made for that.

court; and this is what the circuit for the first three weeks in September comes to. Unless there is a counter-balancing benefit that circuit ought to be abolished.

But there is a more serious objection to the September circuit and that is that the work on which the assignment is founded does not exist. As matter of fact it never has existed during the last twenty years. But the situation today is worse than it was twenty years ago. The assignment is based on half a week's sitting in court in each one of the three western counties. There has not been half a day's work at Pittsfield to say nothing of half a week's work there in any one of the last twenty years. One year the full court was in session there just eight minutes, five of which were devoted to opening the court with prayer and three to taking one case submitted on briefs. Not a single case was argued at Pittsfield that year. At Greenfield and Northampton there is a short half day's work and at Springfield a good day's work. Twenty years ago the court sat at Springfield half a week—that is for the time on which the assignment is based. But of recent years the court has got through its work there in a day.

These three counties together give the court not more than two days' work during the three weeks which by statute the court has to devote to the work of these counties.

But there is a more serious objection than either or both of these to the court's devoting three weeks in September to sitting on circuit in the three western counties. That objection is that the court is not kept busy during these three weeks. To do its work efficiently the court ought to get its work as early in the year as it can. A serious objection to the four weeks' sitting in March is that it overloads the judges late in the year. On an average the court gets in the three weeks devoted to the western circuit about half of the number of cases that it gets in one week's sitting in Boston. Ordinarily a week's sitting in Boston gives the court twenty to thirty cases which have been argued and from five to ten which have been submitted on briefs. For some reason the number of cases submitted on briefs in the out of town counties is materially greater than those submitted on briefs in cases on the Boston docket.

The court has transferred the first consultation which

twenty years ago was assigned for the Monday before the first Tuesday in September to the day after the Pittsfield sitting. It did this because it was not kept busy during the first week in September. But this change did not make much difference. It is still true that the work which the court gets during these three weeks has not and does not keep it busy.

After the legislature abolished the sitting of the full bench at Plymouth the court added a sitting of the court for the commonwealth in Boston in the week in October formerly devoted to Plymouth. This gave the court some thirty-two more cases early in the year. Since this change was made the court has had all the work it wants after the sitting of the court for the commonwealth which it squeezed in in October in what was formerly the Plymouth week. It may be said in passing that the work of the full bench in the two remaining counties of Worcester and Bristol* is decidedly less than it was twenty years ago. Twenty years ago the full court sat at Worcester a full week and at Bristol rather less than a full week; but today it sits at Worcester two days and at Taunton it rarely sits as long a time. It should be added, however, that both the Worcester and Bristol bars submit more cases on briefs than they did twenty years ago.

But the most serious objection to the full court going circuit is yet to be stated. That is that litigants in the counties where the court sits on circuit get but one chance a year to argue their cases before the full bench,* while litigants in the counties for which the court for the commonwealth sits have five chances a year to be heard by the court of last resort, namely, in October, November, December, January and March.

It is not a good administration of justice to give to litigants but one chance a year to argue questions of law before the court of last resort. As I have said, that is what requiring the court to go circuit means for litigants in the counties where the full court sits on circuit. The full court has all it can do to hear and decide the cases on its docket as the full court for the commonwealth after it begins its sittings in

*NOTE.—At Taunton the court sits not only for the county of Bristol but also for the county of Nantucket and for Dukes County.

*NOTE.—Cases can be submitted on briefs at any time during the year no matter what the county is in which they originated.

Boston; that is to say (except for the week squeezed in in October) after the second Monday in November.*

It would not be just to litigants in the counties for which the court for the commonwealth sits in Boston if the court should give parties in the seven counties in which it sits on circuit an opportunity to be heard at Boston as well as at the cities and towns where it sits as a full court for their special benefit. To do so would make the finishing of its Boston docket a matter of doubt. With the exception of only two years (if my memory serves me aright) the court has heard every case on its docket which counsel were ready to argue during the last twenty years; but ordinarily (not always) it was nip and tuck whether the court for the commonwealth would be successful in doing that. Of course there has never been a question of its not doing that when on circuit. I remember that one year counsel in the last case on the Boston docket divided the time left on the last day of the March sitting to avoid that case going over to November. That was before the week's sitting had been squeezed in in October. In several other years, if my memory serves me, it was a question of hours whether it would or would not finish its docket.

Today the court has secured for itself more time than it formerly had for its Boston sittings. This has been done by two matters (seemingly of trifling importance) in addition to squeezing in the week in October. It secured an additional day by making the March sitting begin on Monday instead of Tuesday. Formerly the out of town judges had Monday at their disposal for traveling from their homes to Boston and the March sitting began on Tuesday. Now the judges travel on Sunday and the sitting begins on Monday. The other way in which the court has secured more time was by adding a

*NOTE.—The Chief Justice's assignment of work with the full court for 1918-1919 is as follows:—

10 September, 2d Tuesday,	Berkshire	Law	(½)	1	week
17 September, 3d Tuesday,	Hampshire and Franklin	Law	(½)	1	"
24 September, 4th Tuesday,	Hampden	Law	(½)	1	"
30 September, 3d Monday after 2d Tuesday,	Worcester	Law	(1)	2	"
14 October, 2d Monday,	Suffolk, etc.	Law	(1)	2	"
28 October, 4th Monday,	Bristol	Law	(1)	2	"
11 November, 2d Monday,	Suffolk, etc.	Law	(2)	4	"
2 December, 1st Monday,	Suffolk, etc.	Law	(2)	4	"
6 January, Monday after 1st Wednesday,	Suffolk, etc.	Law	(3)	6	"
3 March, 1st Monday,	Suffolk, etc.	Law	(4)	8	"
Full Court (15½) 31				31	weeks

quarter of an hour to the length of the session when the court changed its custom and adjourned for lunch at one o'clock coming back for a further sitting at two. It was thought possible that time might be lost in breaking off and renewing the argument which was on at the one o'clock adjournment. But in practice this was found not to be the fact. The result was that an additional fifteen minutes a day was gained for every day that the full court sat at Boston. If the full court sat at Boston the full twelve weeks set apart in the assignments for Boston sittings this fifteen minutes a day would amount to fifteen hours, or more than three whole court days.

By these two bits of cheese-paring the court has succeeded in getting just short of a whole week for its Boston docket. Taking the week squeezed in in October and these two changes which I have just spoken of the court has gained in all nearly two weeks for its sittings as the court for the commonwealth.

Although the full court has secured for itself nearly two weeks additional time in the way which I have just stated it needs that and possibly more to make sure of finishing its docket each year. Except for the two years of the war there has been an almost steady increase in the work of the full court taken as a whole. As I have said there has been a decrease in the work of the full bench on circuit. But taking its work as a whole there has been a great increase in its work.

The number of cases argued or submitted on briefs twenty years ago—that is in 1899-1900—was 354, fewer than in any one of the subsequent nineteen years; the largest number during that period was 477 and that was in the year 1913-1914. The average for the first five years was 377; for the next five, 436; for the next three, 388; the next five, 457; and for the two years of the war, 380. The increase in the number in 1913-1914 over that of 1899-1900 is an increase of 123 cases, or a little more than one-third as many again.*

The record made by the court in disposing of its docket year in and year out (with only two exceptions in twenty years) is a remarkable one. It is a record in a matter on

*NOTE.—This is the number argued or submitted on briefs not the number decided during the year in question. Cases decided include cases carried over from a preceding year and do not include cases argued or submitted on briefs which are carried over for decision to the subsequent year. I have taken the number of cases argued or submitted on briefs because I am dealing with the question of the court hearing all cases on its docket.

which the court ought not to take chances in the future. On the return of peace the court ought to be in a position to dispose of a docket of 470 to 490 cases a year. To make sure of doing that it ought to get more cases in September and October rather than in the four weeks' sitting in March.

Convenience of counsel in out of town cases is the main reason ordinarily given for the full court going circuit. That is hardly a sufficient reason when counsel can go from Pittsfield to Boston in four and a half hours, from Springfield in two and a half, and from Worcester in an hour. The inconvenience to which out of town counsel might be subjected by waiting in Boston for their cases to be reached could be avoided by giving precedence to such cases on the first day or days of certain if not all of the sittings of the full court at Boston. For example if the full court sat in Boston on the second Tuesday in September precedence could be given to cases arising in the counties of Berkshire, Franklin, Hampshire and Hampden and subject to that precedence cases arising in the other counties for which the court was then sitting could be taken up. Similar precedence could be given at a sitting of the full court in Boston on the first Tuesday of October to cases arising in the other counties in which the court for the commonwealth does not now sit, namely, Worcester, Bristol, Dukes County and Nantucket. This could be repeated at November and December sittings. At sittings in January and March cases for all those counties could be given precedence. Exactly what arrangement of this kind ought to be made could be determined to the satisfaction of both bench and bar after consultation between the court and the bar associations of the several counties of the commonwealth.

Another reason sometimes given for the full court going circuit is that it keeps the court in touch with the people and so gets the court in the position of having the people behind them. If the full court cannot get the backing of the people in any other way I for one should think that a sufficient reason for the full court going circuit. But I doubt there being much in this. The Supreme Court of the United States would not gain in this respect by sitting in each of the nine circuits into which the forty-eight States are divided by the judicature act. Possibly a State court stands on a different footing in this respect. But I doubt it. And there is something in having to go to the capitol for the argument of

cases before the court of last resort which adds to the prestige and authority of the court. It is not to be forgotten that the justices of the Supreme Judicial Court are not unknown to the people. A single justice sits in equity in Boston every month in the year. Two terms of court (by the requirement of the present statute) are held by a single justice in Suffolk and Middlesex each year and one is held in each of the other counties except the counties of Dukes County and Nantucket. In addition a single justice now sits without a jury in each one of the counties in which the full court is required to sit on circuit.

I venture to suggest that the question whether the full court should or should not go on circuit is a question which ought to be left to be decided from time to time by the court. The court ought to be and is responsible for the administration of justice by it. Since it is responsible for that why not give it a free hand in the matter? Why not let the court from time to time arrange their work in the way which they think "most conducive to the despatch of business and to the interests of the public?" If that is done it may be assumed I think that no conclusion will be reached upon the questions involved until after consultation with the bars of the counties interested. By that I mean that before deciding whether the full court will or will not go on circuit the court will confer with the bars of the several counties where it now sits on circuit as a full court. If the court then decides that it is best for the full bench to go circuit what the circuit should be will be a matter of conference before a decision upon that matter is reached. Then again, if the court after conference decides it "to be most conducive to the despatch of business and to the interests of the public" that the full court should sit in Boston alone it may be assumed, I think, that the bars of out of town counties will be consulted as to the arrangement which ought to be made for their convenience by way of giving precedence to their cases or in some other way before a decision on that matter is made.

To prevent misunderstanding I wish to add that this article has been written by me on my own initiative without consultation with any person or persons and that for the views expressed in it I alone am responsible.

WILLIAM CALEB LORING.

NOVEMBER 18, 1919.

IS EVERY COUNTY COURT IN THE UNITED STATES A COURT OF ADMIRALTY?

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In the United States, as in England, from which our system of laws is derived, we have three different systems of law in the same territorial jurisdiction—the common law, equity, and admiralty.

The practice and procedure in these different systems, though often administered by the same courts, are entirely distinct and different, and the rights and liabilities of the parties under these different systems of jurisprudence are often conflicting, so that if a suit is brought at common law, for instance, the rules of law applied by the court will be different from sometimes just the opposite of the rules to be applied if the suit is brought in admiralty.

Unless by express statute, there is no concurrent jurisdiction at common law and in equity, because apart from statutory provisions equity will not take jurisidiction where there is an adequate and complete remedy at common law. Equity supplements the common law, and gives relief only where the common law is not competent to give it.

On the other hand, there *is* concurrent jurisdiction in common law and in admiralty in many cases, and heretofore, according as a suit was brought in the one or the other, the final results might be, under the different rules of law prevailing in the two systems, directly opposite. For instance, if a passenger on a steamship were injured by an accident to which his own negligence contributed, and he brought his action at common law, his action would fail and he could recover nothing; but if he brought his action in admiralty he might recover one-half of his damages, if he were able to show that the owners or crew of the steamship were in any way negligent, even if his own negligence contributed to the accident.

This is, perhaps, an unfortunate state of the law, and the different systems ought, perhaps, to be brought into harmony by statutes.

But until the statutes are passed and the practice and procedure and the rules of law now prevailing in the different systems are brought into harmony, these rules of law as they are now administered under the different systems must be strictly adhered to by the courts, otherwise there will be no certainty to the law, the courts will be wholly unable to declare what the law is, and the result will be chaotic.

If judges at will apply common-law rules in an admiralty case or admiralty rules in a common-law case, the decision, in cases where the rules of the two systems are different, will not be according to any system of law, but will rest only on the discretion of the judge ungoverned by any law. This would subvert our whole system of government; it would become a government of men and not of laws, and our system of law, of reasoning from one precedent to another, of *stare decisis*, would fall to the ground.[1]

It is therefore with a feeling something akin to dismay to the thoughtful lawyer, when he sees the highest court in the land take a step in the direction that seems to lose sight of the above danger.

So. Pacific Co. v. *Jensen*, 244 U. S. 205, was an action in the New York State Court by a stevedore for personal injuries on board of a vessel lying at a pier in New York Harbor; award was duly made under the New York Workmen's Compensation Act, and judgment entered thereupon and affirmed by the New York Court of Appeals, from which a

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[1] Some of the radical differences between admiralty and common law are:

Contributory negligence bars recovery at common law, but not in admiralty. (*The Max Morris*, 137 U. S. 1.)

At common law, where both parties are at fault, no recovery can be had; in admiralty the damages are divided. (Id.)

At common law seamen can recover damages against the shipowner for negligence of the master and crew, if not fellow servants; in admiralty they recover no damages, but only maintenance and cure. (*The Osceola*, 180 U. S. 158.)

At common law there is no contribution between tort feasors; in admiralty there is. (*The Conemaugh*, 204 U. S. 220, 225.)

There is no set-off in admiralty; at common law there is. (*O'Brien* v. *Bags of Guano*, 48 Fed. Rep. 726, 730; *Howard* v. *Bags of Malt*, 255 Fed. Rep. 917, 918.)

At common law possession of the *res* is necessary for the enforcement of a lien; not so in admiralty. (*The B. F. Woolsey*, 7 Fed. Rep. 108, 114; *The Two Marys*, 16 Fed. Rep. 697, 700.)

At common law a shipowner is not liable for negligent acts of a compulsory pilot; in admiralty he is. (*Homer Ramsdell Co.* v. *Comp. Gen. Trans.*, 182 U. S. 406; *The China*, 7 Wall. 53.)

Salvage is not allowed at common law; in admiralty it is. (*Housman* v. *Cargo ex No. Carolina*, 15 Peters, 40, 48.)

writ of error was taken to the Supreme Court of the United States, and it was there, by a court divided five to four, *held*, that, as the case was one of admiralty jurisdiction, even though the state court had concurrent jurisdiction, the admiralty rules of liability must be followed in the common-law courts and not the rules prescribed by the common law or statute law of the state; that the New York Workmen's Compensation Act could not therefore govern in such a case, and the judgment of the New York Court of Appeals was error and must be reversed.

It would seem then from this decision that every court of common law of the United States and of the several states is now also a court of admiralty: that is to say, where the cause of action whether contract or tort is maritime, the court of common law, if it has jurisdiction, is to administer and apply not the common-law rules and principles, but the admiralty and maritime law of the United States.

If a court has jurisdiction of marine torts and contracts, and applies to them in every case the rules and principles of the admiralty law, why is it not a court of admiralty? That it cannot proceed *in rem* is simply to say that its admiralty jurisdiction is limited to actions *in personam*, but in actions *in personam* the practice and procedure would be almost identical in admiralty and at common law.

The common-law court administering admiralty law would have jurisdiction of collisions, personal injuries to seamen, passengers, stevedores, and liabilities of tugs to tows; injuries to vessels in docks, marine nuisances or obstructions, etc., when these things occur in navigable waters; of marine policies of insurance, charter parties, bills of lading, demurrage and contracts of affreightment generally, shipping articles and wages contracts.

These constitute the bulk of cases coming within the admiralty jurisdiction, as prize, salvage, general average and bottomry bond and other admiralty cases are comparatively few.

Admiralty jurisdiction was conferred upon the county courts of common law in England by Act of Parliament in 1868. By the above case it has only recently, in May, 1917, been conferred upon the common-law courts of the United States and of the several states, by what it seems no exag-

geration to call legislation emanating from the Supreme Court of the United States by a court divided five to four.

So far as my personal observation goes, this great innovation has not been properly realized, even by the admiralty bar of the United States, but when it comes to be realized and felt by the common-law lawyers, I am anticipating an outcry which will result in a promptly passed Act of Congress setting aside the law as laid down by the majority of the court in the above case, just as in October, 1917, an Act of Congress was passed (40 U. S. Stats. at Large, 395) to make the state laws for Workmen's Compensation applicable in maritime cases, after the majority of the court in the above case in May, 1917, had held that the New York Workmen's Compensation Act was not applicable even in the New York common-law courts, because it was not a part of the maritime law of the United States.[2]

We now, June 3, 1918, have another decision along the same lines by the Supreme Court of the United States again divided, with the same judges constituting the majority and holding, in a case brought in the state court of New York at common law, and removed by the defendant to the Dis-

[2] The following act is perhaps sufficient to accomplish the desired result:

An Act to further amend the new Judicial Code.

Be it enacted by the Senate and House of Representatives of the United States in Congress assembled, as follows:

Article third of section 24 of chapter 231 of Act of Congress March 3, 1911, known as the New Judicial Code, as amended by Act of Congress December 11, 1911, chapter 5, and by section 1 of chapter 97 of Act of Congress October 6, 1917, is further amended to read as follows:

Third. Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy, where the common law is competent to give it, and to claimants the rights and remedies under the Workmen's Compensation Law of any State: of all seizures on land or waters not within admiralty and maritime jurisdiction: of all prizes brought into the United States: and of all proceedings for the condemnation of property taken as prize: *Provided, however,* that in all cases brought by suitors at common law for their common law remedy, above reserved to them, the rules of the common law and appropriate statute law of the states or of the United States shall be applied and not the rules of the admiralty and maritime law of the United States.

Article third of section 256 of chapter 231 of Act of Congress March 3, 1911, known as the New Judicial Code, as amended by section 2 of chapter 97 of Act of Congress October 6, 1917, is further amended to read as follows:

Third. Of all causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy, where the common law is competent to give it, and to claimants the rights and remedies under the Workmen's Compensation Law of any state: *Provided, however,* that in all cases brought by suitors at common law for their common-law remedy, above reserved to them, the rules of the common law and appropriate statute law of the States or of the United States shall be applied and not the rules of the admiralty and maritime law of the United States.

trict Court of the United States, on the common law side, for personal injuries to a seaman, that the maritime law of the United States and not the common law was to be applied, and that the seaman could not recover damages at common law for his injuries, but only maintenance and cure in accordance with the admiralty law. *Chelentis* v. *Luckenbach SS. Co.*, 247 U. S. 372.

This, of course, is nothing more nor less than the exercise of admiralty and maritime jurisdiction by a common-law court, and constitutes every county court in the United States a court of admiralty, a thing unheard of heretofore, and a step, which, unless abrogated by Act of Congress, will lead to great uncertainty in the law, to the mixing up of our two systems of common law and admiralty, the multiplying of different decisions in the different States, and to other results which cannot be foreseen at the present time.

To an old admiralty lawyer it is always pleasant to see the admiralty and maritime jurisdiction extended in every legitimate way, but it is something of a shock to see, not by statute but by the decision of a court, a whole new system of law substituted for their own and imposed after one hundred and thirty years of the application of the common-law rules in maritime cases, upon all the courts of the country which have never exercised or applied the admiralty and maritime law before.

What is still more extraordinary is that the Supreme Court of the United States has consistently held that the grant of admiralty and maritime jurisdiction to the United States under the Constitution and Judiciary Act was exclusive. (*The Moses Taylor*, 4 Wall. 411, 430; *The Hine* v. *Trevor*, 4 Wall. 555, 569.)

In fact, it so holds in terms in this very case of *So. Pacific* v. *Jensen*, at page 218, and the court has jealously prohibited the state courts from exercising it and the State legislatures from infringing upon it, and now without referring to these cases or in terms overruling them, it proceeds to confer admiralty jurisdiction not only on the common-law courts of the United States, but as shown above on every common-law county court of the several States.

Nor is this all, the Supreme Court of the United States itself has always heretofore in cases brought by writs of error

from the state courts, which, being also maritime causes of action might have been brought in admiralty, applied the common-law rules and principles even where the admiralty principles and rules of decision were different.

Belden v. *Chase,* 150 U. S. 674, was an action for collision in the Hudson River brought at common law in the Supreme Court of New York; the case was tried three times in that court, went twice to the general term of the court, and twice upon appeal from there to the Court of Appeals of New York; a writ of error was taken to the Supreme Court of the United States, and Mr. Chief Justice Fuller delivered the opinion of the court.

This was certainly a well considered case, if ever there was one, and the court held unanimously that the admiralty rule of an equal division of damages where both vessels were guilty of faults contributing to the collision, did not prevail, but that the common-law rule, that if both vessels were guilty of faults contributing to the collision, neither could recover, was to be applied.

In *Atlee* v. *Packet Co.,* 21 Wall. 389, Mr. Justice Miller, delivering the opinion of the court, says at page 385: "The plaintiff has elected to bring his suit in an admiralty court, which has jurisdiction of the case, notwithstanding the concurrent right to sue at law. In this court the course of proceeding is in many respects different, and the rules of decision are different. The mode of pleading is different, the proceeding more summary and informal, and neither party has a right to trial by jury. An important difference as regards this case is the rule for estimating damages. In the common-law court the defendant must pay all the damages or none. If there has been on the part of the plaintiffs such carelessness or want of skill as the common law would esteem to be contributory negligence, they can recover nothing. By the rule of the admiralty court where there has been such contributory negligence, or in other words, when both have been in fault, the entire damages resulting from the collision must be equally divided between the parties."

Quebec SS. Co. v. *Merchant,* 133 U. S. 375, is a common-law case, tried by a jury, where the common law was applied.

Sherlock v. *Alling,* 93 U. S. 99, is another common-law case in the Supreme Court of Indiana. The Indiana Statute

giving a remedy for death by negligence was upheld and applied by the Supreme Court of the United States.

These are only a few of the cases where the Supreme Court of the United States in maritime cases brought in the common-law court has applied and enforced the rule of the common law.

There seems to be no good reason for this great innovation by the Supreme Court; in fact, in reading the opinions of the majority of the court in the So. Pacific Co. and Luckenbach SS. Co. cases, *ubi supra*, they hardly seem conscious that it is a new and unheard of thing that they are doing.

It is to be hoped that Congress will promptly pass an act, restoring the old order of things, or else a more comprehensive act covering all the points of difference between the common law and admiralty rules of decision, otherwise the law both in the admiralty and at common law in maritime cases will soon be in a chaotic state.[3]

FREDERIC CUNNINGHAM.

909 Exchange Building, Boston, Mass.

[3] The mess into which we are getting through these extraordinary decisions of the Supreme Court is well illustrated by the recent case of the Howell (257 Fed. Rep. 578), which holds that a State legislature can, by passing a workmen's compensation act, entirely do away with the remedy in admiralty in the courts of the United States, whether *in personam* or *in rem*, in cases covered by the act.

THE IMMEDIATE NEED OF PERMANENT LEGISLATIVE DRAFTSMEN TO ASSIST COMMITTEES BEFORE BILLS ARE REPORTED AND TO CONSOLIDATE THE LAWS ANNUALLY.

The passage in the report of the Commissioners to consolidate the Statutes, suggesting the need of more frequent revision of the laws, should recall to the attention of the legislature the recommendations made by the Joint Legislative Committee of 1914 which was appointed to study the subject of legislative procedure.

That committee consisted of:

Hon. Henry G. Wells.....of Essex
Hon. Walter E. McLane.....of Bristol
Hon. James P. Timilty .....of Suffolk of the Senate, and
Messrs. Henry E. Bothfeld .....of Newton
Thomas E. P. Wilson.....of Lynn
Charles H. Webster ....of Northfield
George M. Worrall.....of Attleboro
Robert Robinson .....of Boston
John G. Lydon .....of Boston of the House.

Their report was made in 1915 and was numbered House Document 280 of that year. As the report contained a great deal of valuable information which is not generally known and cannot be found elsewhere, relating to the congested and badly arranged system of conducting the legislative business of the state and, as it also contained many practical suggestions worthy of serious consideration, reprints were obtained and distributed to each member of the Massachusetts Bar Association in 1915. Parts of this report were quoted in the "American Bar Association Journal" for July, 1915, for distribution throughout the country (see pages 293, 363). Three of the minor recommendations in this report were adopted in Chapters 205, 209 and 213 of 1915, providing general rules as to matters on which special legislation was often sought, but most of the suggestions were either referred to the next legislature or disposed of in some other way, so that very little improvement in the methods of dealing with legislative business is yet in sight.

Special attention is called to that portion of this House Document 280 of 1915 (pages 45-53) relative to the drafting of statutes, from which the following extracts are quoted, because of their sanity and importance. The Joint Committee said:

> "We are trying to do twice or three times the work to-day with the same legislative machinery as twenty years ago, and the natural result is ill-considered and poorly drafted laws. These require constant revision and cause litigation and expense to our citizens.
>
> . . . . . .
>
> The legislature of 1914 was compelled to change in some way 66 of its own acts and 383 acts of its own and of four preceding legislatures. Attention is also directed to the large number of acts each year which are affected by the immediate succeeding legislature. In other words, 110 acts of 1913 were affected by 1914, and 101 acts of 1912 were affected by 1913, and so on.
>
> . . . . . .
>
> We do not believe in organizing another department for the use of anybody who desires every sort of a fool bill drafted. We believe our present method of assistance given to incoming members on the part of the clerks to the committees on rules has been abused. If a man desires legislation, let him present his own petition and draw his own bill.
>
> We do believe in the creation of an official, with such assistants as may be necessary, to be called a clerk of committees. His services should be at the disposal of committees in drafting bills to be favorably reported, and every bill so reported by a committee should bear his endorsement of approval. Every bill substituted for an adverse report should also be referred to this official for approval. He should not waste his time on matters that have no prospect of becoming law. Every law should, however, under compulsion, have careful scrutiny as to its form and as to its compliance with certain principles hereinafter referred to.
>
> The committee on bills in third reading, with clerical assistants in each branch, are now allowed forty-eight hours to examine bills submitted to them. This is en-

tirely inadequate for the purpose, and in long bills permits only the correcting of language and a verification of references. Supplementary to the above system it would be adequate, and we believe such a check should be maintained.

Such an official as a clerk of committees, to have charge of drafting legislation, would have to be an expert, or one capable of becoming an expert. . . . Time should be taken to investigate the question of constitutionality, with reference to both the state and national constitutions, and any judicial decisions thereon.

Each Act should be carefully tested as to its harmony and co-ordination with existing law, to see whether it is a duplicate of any other law, or is inconsistent with any, or does in another way what is already done in one way. The provisions of the Act should be clearly adequate to its purpose without accomplishing something never intended. They should be studied with reference to economic, social, and business conditions of that part of society affected. With all this there should be brevity, simplicity of form, and freedom from ambiguity.

If that is not a task for an expert we know of none.

. . . . . .

This office should be created by the legislature and be under the control of the legislature. The incumbent should be assured, either directly or indirectly, of some permanency in his tenure of office. He should be absolutely non-partisan, and should in no way initiate or influence legislation.

. . . . . .

Between the sessions of the legislature, he could bring up to date the laws on some particular subject by a process of revision, elimination, and codification, repealing obsolete parts and harmonizing conflicting portions."

With the expenses of the government increasing every day in every direction, is not the present session of the legislature a peculiarly fitting time for serious consideration of these simple, practical suggestions made by experienced Massachusetts legislators?

As pointed out in the report of the Commissioners to Consolidate the Laws, it has been the habit in this state to revise

the laws about once in twenty years. Such a habit has been a very expensive one. The expense is not the fault of the commissioners who have made these revisions. It is the result of the habit of letting things run on for twenty years instead of keeping the laws arranged and annotated from year to year so that when the legislature decides that another published consolidation of the statutes is needed they will have the material prepared for the consolidation commissioners to work on, instead of the necessity of doing all the preliminary work of arranging and annotating the enormous number of statutes of the previous twenty years as well as the work of fitting them into the last revision.

Now that we have a new consolidation which will be ready this year for legislative action, it seems to be the most fitting time to abandon the old habit and to establish permanent draftsmen at reasonable compensation for competent men who can serve as clerks of committees and who can also act as annual arrangers of the laws so that the coming consolidation can be kept up to date at the State House for convenient reference by future legislators as well as by other public officials who wish to find out in a hurry the existing state of the law when they have not time to wade through a mass of statutory amendments. The records, notes, reports, etc., and the system of the present commission form a valuable plant. Don't let it be "scrapped" or put in a cellar where it is of no use. Let the work be kept up from year to year and save time and money on the next revision.

The Committees on Third Reading in the House and Senate have to-day paid assistance but, owing to the present system described in the passage above quoted the legislature and the state do not get the assistance which they could get if the practice were slightly changed so that each legislative committee could have trained assistance before a bill was reported to the legislature. The idea of the Committee on Third Reading should be applied at an earlier stage of the proceedings.

If such a system as was suggested by the Joint Committee of 1914 were established with the relatively small appropriation for salaries which would be needed, the state in the long run would probably save thousands of dollars. Not only that, but the saving of the time of judges, and of public officials who have to consult the statutes, which would result from the greater care in the drafting of legislation and the

annual arrangement seems obvious. The danger of mistaken understanding of the laws would be very much reduced.

Every consideration of possible convenience and economy seems to require that at the same time the coming consolidation is enacted and published by the legislature these simple changes in legislative procedure should be adopted in order that the material may be kept up to date for the benefit of the legislature.

Of course this does not mean that a new consolidation of the laws should be published every year.

Nothing in this suggestion is intended in any way as a criticism of the commissioners who have prepared the pending consolidation. I believe that the commissioners and their assistants deserve credit for the care with which their work has been done, but such a commission ought to be unnecessary in the future and the committee of 1914 has pointed out a simple, inexpensive method of avoiding the need of it.

F. W. G.

Note.

A bill for the purpose above described, introduced on petition of Frank W. Kaan, Esq., is now pending before the Judiciary Committee and numbered House 913.

THE PROPOSAL TO REPEAL THE CONSTITUTION OF MASSACHUSETTS AND SUBSTITUTE THE RECENT "REARRANGEMENT" THEREFOR.

In the advisory opinion of the justices of the Supreme Judicial Court (reprinted above as House 993) they stated their conclusion that the rearrangement was not submitted to the people nor adopted by them as a new substituted Constitution in place of the Constitution of 1780 and its amendments. The justices demonstrate the fact from the records of the convention that this rearrangement was not prepared as a substituted Constitution and was not considered by the convention as a substituted Constitution, whatever individual members of that body may have thought about it. The records show that it was prepared and submitted merely as a document which would prove convenient in practice for quick reference, but not as a document having the binding force of the fundamental law.

As soon as the opinion was announced, the document reprinted above (Senate 243) was submitted to the legislature and referred to the Committee on Constitutional Amendments. The petition on which it was based is as follows:

PETITION.

"To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court Assembled.

The undersigned citizen of Massachusetts respectfully represents

That the Constitution of 1780 with its Amendments be repealed and that the rearrangement of the same submitted by the late Constitutional Convention and adopted by the people on November 4, 1919 be adopted as the Constitution of the Commonwealth with such modifications as may be necessary.

A draft of the measure accompanies this petition.

AUGUSTUS P. LORING."

Some support for this suggestion has appeared in some of the papers, but those who support it seem to forget that the

provisions in the I. and R. Amendment, which succeeded the Ninth Amendment, provide only for the consideration of "specific amendments" by the Legislature. While Senator Loring's proposal is drawn in the brief form of a specific amendment, it is not an amendment at all. It is a proposal for a total repeal of the Constitution and for the substitution of another complete document. It cannot by any theory be argued into a "specific amendment." The only way in which Senator Loring's proposal could possibly be brought about would be for the Legislature to call another constitutional convention. So much for the law.

The next question to be considered is the desirability of the proposal.

It is generally understood that one reason why the convention did not recommend the rearrangement as a substituted Constitution was that, if the new amendments should be woven into the original articles and the whole adopted by the people in a lump, the original phrases of the Constitution might be so colored by the insertion of the new matter that the prior decisions of the Court as to their meaning might be affected or even reversed, and thus the continuity of construction of any particular article might be broken and the constitutional law rendered uncertain in unforeseen ways.

Members of the convention knew that, even with the greatest care, they, themselves, in preparing the amendment providing for biennial elections had inadvertently provided for hold-over legislators by the accidental repetition of a phrase. With so fresh an example of the unforeseen results of revision before them, it was a natural and wise course for the convention to avoid such results by preparing the rearrangement for convenient reference, but not as a substituted Constitution. Why should we court now the results which the convention sought to avoid?

As a matter of fact, I believe the constitutional law of Massachusetts is simpler and clearer today than that of most, if not all, of the other States of the Union because Massachusetts has not wiped out from the face of the document the continuity of its history by general revision as has been the custom in other States. The development of a constitution is a story. Everyone knows that a story can be better understood if it appears in chronological order. It is for the inter-

est of the people of Massachusetts that their constitutional law should be kept as simple as possible in this respect.

I submit that such inconvenience as there is (and I think it is exaggerated in the enthusiasm of discussion), is far outweighed by the great value of retaining the historical order of the provisions in a document of the nature and national influence of the Massachusetts Constitution of 1780. Even the legal profession, which is charged with too strict a study of precedent, has a short memory for history and, if the "rearrangement" were substituted for the old constitution and its amendments, we all know, if we stop to think about it, that both the courts and the bar would know less in future than they know today about the history of constitutional principles in Massachusetts. Such a development is not desirable. There is a human tendency, even among able and highly trained lawyers, under the pressure of business, to follow the path of the least intellectual resistance and stop thinking at the last "codified" version, whether it be of a statute or of a constitution. We all know that this is true. Even under the spur of controversy, men are apt to rely upon their own unaided imaginations in attempting to interpret constitutional provisions without taking the trouble to study carefully their history. Leave the constitutional law in its original form with its clear continuity of development, and thus force the minds of the bench and bar to marshal the historical facts connected with that development in order to throw light upon arguable questions of interpretation in the future.

The analogy of the revision of statutes, which run into the thousands, is misleading. The Constitution is a very different thing. The Massachusetts Constitution of 1780, even as it stands today with its amendments, is still one of the shortest in the country. Today it is a document having national influence which no revision, however well prepared, would ever have. The fever for codification has limits to its usefulness. I believe the people of Massachusetts, if they understood the question, would not wish to sacrifice their constitutional story as it now appears, for the supposed "convenience" of lawyers.

What is to be Done With the Rearrangement?

The question may be asked what is to happen to the rearrangement under the present circumstances? Is the bar and

the public to be deprived of whatever assistance and convenience there may be as a result of the work of Judge Morton and his associates on the committee which prepared the rearrangement? There seems to be no reason for excitement on this subject. There is no reason why the rearrangement may not be printed with the original document and its amendments for the use of those who may find it convenient.

In order to get the practical value of the rearrangement, it is not necessary from any point of view to repeal the constitution and substitute the rearrangement any more than the fact that some one writes a careful and convenient textbook about the constitution or the statutes is a reason for repealing them and substituting the textbook.

If there are any changes in it which upon further examination seem desirable to be made to avoid misunderstanding, there is no reason why they should not be made. The vote of the people has given no legal force to the document which prevents its being revised and kept up to date in case of future amendments to the original constitution. There will be no more need of submitting any such changes to popular vote than there was of submitting the rearrangement itself.

If the legislature sees fit to print a convenient textbook about the constitution for the information of the public, there is no reason why it should not do so. Of course there should be a clear introductory statement by the Secretary of the Commonwealth that the document is not the constitution, with a reference to the advisory opinion of the justices. There also should be convenient marginal references printed to the articles and amendments of the constitution. But all these things can be done in such a way that the practical value of the document for convenient use, whether by lawyers or teachers and students in schools and colleges, may be secured without disturbing the continuity of the "body of constitutional law which has been stabilized by its slow growth," to use the words from the opinion of the justices.

The Popular Vote and Its Effect.

The suggestion that the rearrangement is "the people's text which they have adopted as their revised and amended constitution and their last word," is not applicable to the facts because, as pointed out by the justices, the people's vote was directed as much to Section 157 as to any other part

of the document. The answer of the people is not broader than the question asked them.

The vote of the people approving this rearrangement does not require *as a matter of constitutional law* that it should be printed with the laws. It may be proper that it should be so printed, but the vote on the question under the terms of Article 157 as interpreted by the justices of the Supreme Judicial Court, was not a constitutional mandate.

The so-called "ratification" at the polls was unnecessary from a legal point of view and under the circumstances added nothing to the authority of the legislature to print the rearrangement, as prepared by the convention, as a convenient document.

Furthermore, the argument based on the popular vote at the state election in regard to this matter is not very impressive, particularly when made by those who have always regarded the calling of the constitutional convention, itself, as well as the adoption of the I. and R. Amendment, etc., as the work of a minority of the voters (cf. p. 13).

The official returns of the votes relative to the "rearrangement" as tabulated by the Executive Council and printed at the end of this note show that the total number of votes cast at the state election on November 4, 1919 was 532,483 and, of this number, only 263,359 were cast in favor of the rearrangement. 64,978 were cast against the rearrangement, and 204,146 people who went to the polls on that day did not vote either way on the question. Accordingly, the votes in favor of the "rearrangement" were less than one-half of the votes cast at the election, and probably not more than one-third of the qualified voting population.

There is no indication whatever that the 263,359 who voted in favor of ratifying the rearrangement understood it to be a substituted constitution. I know at least one voter who voted to ratify the document as a rearrangement on the distinct understanding that it was not a substituted constitution. That vote would never have been cast in favor of the document as a substituted constitution. The view that the rearrangement was not a new constitution was explained in, at least, three newspapers in the state before the election.

Since the relation of this "rearrangement" to the old document has fortunately been clearly pointed out by the advisory opinion of the justices at the outset, there is no reason

to anticipate any serious confusion if the practice of keeping the references distinct is followed in some such manner as was suggested in IV Mass. Law Quart. p. 322.

F. W. G.

Note.

THE COMMONWEALTH OF MASSACHUSETTS.
EXECUTIVE DEPARTMENT, COUNCIL CHAMBER,
BOSTON, November 26, 1919.

The Committee of the whole Council to whom was referred the returns of votes on the Rearrangement of the Constitution of the Commonwealth submitted by the Constitutional Convention, given in the several cities and towns, in the manner prescribed by the Constitution and Laws of the Commonwealth on the fourth day of November last past, report as follows:—

		Yes.	No.
County of	Barnstable	1,621 votes.	490 votes.
"	Berkshire	7,710 "	2,677 "
"	Bristol	19,860 "	5,613 "
"	Dukes	316 "	73 "
"	Essex	34,242 "	9,283 "
"	Franklin	2,968 "	889 "
"	Hampden	17,187 "	5,012 "
"	Hampshire	3,995 "	1,747 "
"	Middlesex	59,249 "	14,282 "
"	Nantucket	183 "	40 "
"	Norfolk	17,646 "	3,549 "
"	Plymouth	11,293 "	2,453 "
"	Suffolk	58,253 "	11,801 "
"	Worcester	28,836 "	7,069 "
Totals		263,359 votes.	64,978 votes.

And the said Rearrangement appears to be ratified.

The number of persons who voted at the State Election, as returned under the provisions of Chapter 835, Section 329, Acts of 1913, as amended by Chapter 109, Section 3, General Acts of 1917, was 532,483.

Respectfully submitted,
JAMES G. HARRIS,
Chairman.

THE THIRD OPINION OF THE SUPREME JUDICIAL COURT AS TO FORECLOSURE OF MORTGAGES IN MASSACHUSETTS UNDER THE SOLDIERS' AND SAILORS' ACT.

The Opinion of the Court In

JOHN HANCOCK MUTUAL LIFE INS. CO. *v.* LESTER et al, Trustees.

(Decided Jan. 9, 1920.)

It is well settled that during the time the "Soldiers' and Sailors'" Civil Relief Act is in force a mortgagee forecloses under a power of sale contained in a mortgage at his own peril "unless upon an order of sale previously granted by the court and return thereto made and approved" by it; and that while a sale is not necessarily bad, it is of no validity if made during the "military service" of an owner of land, or within three months thereafter, if consummated without such order and return. U.S. St. 1918, c. 20, s. 303 (40 U.S. St. at L. 444). *Hoffman* v. *Charlestown Five Cents Savings Bank*, 231 Mass. 324, *Morse* v. *Stober*, 233 Mass. 223.

It is equally clear that if there is no jurisdiction to make such order as this statute contemplates, mortgagees are deprived of the benefit of this provision, are left without an adequate remedy under powers of sale contained in their mortgages, and must either postpone foreclosures until the act ceases to apply or proceed by entry under R. L., c. 187, s. 1, or by action at law under other sections of that chapter. It is urged that no order authorizing foreclosure by sale can be entered unless some owner of the property is in the military service, thus leaving mortgagees without the protection of an order under the act in cases where they either are unable to establish the existence of owners in the service, or where they do satisfy the court that no owners are therein. *Hallowell* v. *Ames*, 165 Mass. 123, recognized that the existence of special facts requiring equitable relief may be a sufficient basis for jurisdiction in equity in the foreclosure of mortgages, and *Old Colony Trust Co.* v. *Great White Spirit*

Co., 178 Mass. 92, with an abundant citation of authorities declared the same rule. The statute under consideration expressly provides for orders of foreclosure, and in the Hoffman Case, at page 329, it is said that "the existence of the soldiers' and sailors' civil relief act is a special circumstance which is sufficient to give the equity courts of the Commonwealth jurisdiction to foreclose . . . [power of sale] mortgages within the time specified in the act." The Morse Case in effect approves this statement. What was said as to this question in the Hoffman Case is now decided.

The mortgages in question are upon valuable property in the business centre of Boston, and were given to secure the payment of $3,500,000. No interest has been paid since that due October 1, 1917, and taxes and betterment assessments to the amount of many thousand dollars have not been paid. The mortgagors were the trustees under an "agreement and declaration of trust," and the defendants are their successors in trust. While it is conceded that they hold the legal title to the premises, there are outstanding equitable interests evidenced by certificates for 30,000 shares of the face value of $3,000,000. The shareholders are numerous, and some of them are in military service within the act.

The trustees claim that the shareholders are owners under the act. Whether their interests are legal or equitable this contention is assumed to be correct under the decision in the Hoffman Case. The trustees further contend that no order authorizing foreclosure should be entered because the shareholders "are not parties, and no inquiry has been made as to their plight, and some of them have entered the military service, and their rights would be cut off by foreclosure."

The failure to join the shareholders as parties does not prevent the entry of an order of sale. Their interests are fairly and sufficiently represented by the trustees whose duty it is to act in their interest. There is no adversary relation or action between them and the trustees. *Stevenson* v. *Austin*, 3 Met. 474; *Shaw* v. *Norfolk County Railroad*, 5 Gray, 162, 171; *Ashton* v. *Atlantic Bank*, 3 Allen, 217, 219; *Jewett* v. *Tucker*, 139 Mass. 566, 577; *Kerrison* v. *Stewart*, 93 U.S. 155, 160; *Manson* v. *Duncanson*, 166 U.S. 533, 543; *Colorado & Southern Railway Co.* v. *Blair*, 214 N.Y. 497, 513. See Eq. Rule 24, of this court. The act does not provide that

no order of foreclosure shall be made where owners are in the military service.

The petition in this case was filed July 16, 1919. In addition to service on the trustees, a general order of notice has been published. The trustees only have appeared. Under the trust instrument, the trustees who "take charge of and manage the property . . . as they . . . deem for the interest of the shareholders," do not present to the court any reason why the mortgages should not be foreclosed, apart from the fact that persons who are "owners" under the statute are in military service. It is not urged that the mortgagee's interests do not require a foreclosure, or that a foreclosure would inequitably affect the interests of those in military service. Interest and taxes form a rapidly increasing burden on the property. The trustees do not claim that foreclosure is unwarranted because of impaired ability of certificate holders to comply with their obligations because of military service, and no such representation has been made by any person in their behalf. It is nearly fifteen months since the signing of the armistice. Free course of mails between this country and Europe has existed for many months. Here the activities and sacrifices of war no longer engage the minds of men or forbid attention to business. It is clear that the ability of shareholders to comply with the terms of the mortgages is not now materially affected by reason of such service.

The plaintiffs are entitled to a decree authorizing the foreclosures in accordance with cl. 3, of s. 302 of the act. The form of the decree is to be settled by a single justice, but it is to provide for a sale or sales, without the intervention of a commissioner or special master, substantially in accordance with the powers of sale contained in the mortgages, and without further notice than that required by said powers, unless in the discretion of the single justice, it is deemed necessary or advisable to provide for additional notice, or for an extension of the time required for notice of sale under the powers, or required by R. L., c. 187, s. 14, as amended by St. 1906, c. 219. See St. 1918, c. 257, s. 439, as amended by St. 1919, c. 5.

So Ordered.

Discussion of the Opinion.

The foregoing opinion, which is very carefully phrased, clears the air considerably for practical purposes. It shows a discriminating grasp of a delicate but very practical problem which has disturbed the minds of the bar. It contains several positive statements of great practical value for the guidance of practitioners and there is a noticeable lack either of emphasis or reference to certain dicta which appeared in the earlier opinions in the Hoffman Case and in the Morse Case, and which caused much uncertainty as they appeared to many practitioners to be contrary to settled rules of law and of statutory construction.

While the opinion reaffirms certain conclusions in the earlier cases of Hoffman and of Morse, which the writer believed to have been and still believes to be mistaken, for the reasons suggested in the earlier discussions of this subject in Mass. Law Quart., Vol. IV, pp. 35 and 218; yet, those conclusions which are reaffirmed by decision in this latest opinion were the least serious part of the practical legal situation resulting from the earlier opinions.

In the first place, the opinion states squarely in the first sentence that a mortgagee is not obliged to apply to the court for leave to foreclose, if he prefers to take whatever legal risk there is of not so applying. Thus is swept away by the opening sentence the atmosphere of uncertainty which was created by the Hoffman opinion, and, probably, not wholly removed in the minds of many by the Morse opinion, as to whether court proceedings were practically essential to the validity of foreclosures in general.

The next noticeable thing for practical reference is the express recognition in the first sentence of the second paragraph of the opinion that the right to "Proceed by entry under R. L., c. 187, s. 1" without leave of court is not affected by the Soldiers' and Sailors' Act. This positive statement sweeps away all the doubt which has existed in the minds of some members of the bar since the Hoffman opinion as to whether an entry without leave of court was justified or valid.

Another noticeable thing for practitioners is the decision that where the owner of the equity is a real estate trust, like

that involved in the case, "The failure to join the shareholders as parties does not prevent the entry of an order of sale. Their interests *are fairly and sufficiently represented by the trustees whose duty it is to act in their interest.*"

Furthermore, while the claim "That the shareholders are owners under the act" whether their interests are legal or equitable is "assumed to be correct under the decision in the Hoffman Case," the court calls attention to the fact that "The act does not provide that no order of foreclosure shall be made where owners are in the military service."

On the question of jurisdiction in the absence of allegations and evidence of the fact that some owner of the equity *was* in military service, the court *decided* that the jurisdiction exists on the ground suggested in the Hoffman Case, "That the existence of the Soldiers' and Sailors' Civil Relief Act is a special circumstance which is sufficient to give" jurisdiction to allow or direct foreclosure by sale under the power in the mortgage.

This passage in the Hoffman opinion was commented on in a previous discussion on page 42 of Vol. IV of the Mass. Law Quart. on the ground that "The act of congress does not seem to be a 'circumstance' on which the equity jurisdiction of Massachusetts courts depends." Although the present opinion decides that, for the practical purposes of this foreclosure jurisdiction, this particular act of congress is such a "circumstance," the decision merely establishes a reasonable practical rule for Massachusetts for this particular purpose and, as long as it is not extended into a suggestion that every act of congress now or hereafter existing must be considered a "circumstance" in the nature of a jurisdictional fact as distinguished from law, there is no reason to anticipate any confusion in other branches of the law resulting from the statement quoted. The opinion is very carefully phrased in this respect so that it does not invite an enlarged application.

Coming now to those portions of the earlier opinions which are noticeable by their absence from this latest opinion, first, there is no reference to the suggestion in the Hoffman Case that our Statute of Frauds, requiring express trusts of land to be in writing, is not applicable to cases under the Soldiers' and Sailors' Act.

Second, the suggestion in the Hoffman Case, which was repeated in the Morse Case, that "The act of congress takes no account of our statutes as to registration of deeds," is not mentioned in this opinion.

The facts did not require a discussion of either of these earlier *dicta,* so that the fact they are not again mentioned may have no special significance but, at least, they are not reaffirmed. They are the two suggestions which have puzzled the bar, perhaps, more than any other parts of the earlier opinions and, in regard to the second one relating to our registration act, the following communication which was recently received from a correspondent is printed below in a note for the information of the bar.

F. W. GRINNELL.

Note.

To the Editor Mass. Law Quarterly:

In *Morse* v. *Stober,* 233 Mass. 223, 227, it is said of the Soldiers' and Sailors' Civil Relief Act, "The act of Congress in this regard takes no account of our statutes as to registration of deeds." But in *Chipman* v. *McClellan,* 159 Mass. 363, 371, the court, in deciding upon the powers of national banks to make contracts, adopted the language of Miller, J., in *National Bank* v. *Com.,* 9 Wall. 353, 362, viz.: "Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on state law." And *Leavenworth Bank* v. *Hunt,* 11 Wall. 391, was also referred to as a case in which "the question of the validity of a mortgage to a National Bank turned on the point whether it was recorded in accordance with a state law." In this last case, Field, J., said (p. 394), "The mortgage was never deposited in the office of the register of deeds of the county where the property was situated or the mortgagors resided, and was therefore void as against creditors under the statute of Kansas." It would have been much simpler and more convenient if the question of the possible rights of an unknown soldier or sailor in *Morse* v. *Stober* had been disposed of on this ground. It is to be hoped that what is said in this case may be considered as only a dictum and not as intended to overrule the cases above mentioned.

THE OPINION OF THE ATTORNEY-GENERAL ON THE RECENT SAVINGS BANK REFERENDUM.

In a recent circular issued by the Bank Commissioner to Savings Banks appears the following opinion of Attorney-General Wyman:

BOSTON, November 29, 1919.

Hon. AUGUSTUS L. THORNDIKE,
Bank Commissioner.

DEAR SIR:

I acknowledge the receipt of your letter of November 10th, in which you ask the following question:—

> "As the question has been raised whether savings banks and trust companies having savings departments may pay dividends or interest monthly or semi-annually, I respectfully ask your opinion whether chapter 116 of the General Acts of 1919, which was suspended by a petition for a referendum, and which I understand was afterwards ratified by the referendum vote, is the rule, or whether chapter 326 of the General Acts of 1919, which is an amendment of said chapter 116, is the rule?"

The effect of the petition for the referendum on chapter 116 of the General Acts of 1919 was to suspend the operation of the law pending the action of the voters thereon. They having acted, and, as I understand, approved the law, it takes effect thirty days after such approval.

This law had not in the meantime been repealed. Gen. St. 1919, c. 326, amended it. Suspending the operation of the original act suspended the operation of the amendment. The approval of the original act carried with it the approval of the amendment.

The legislative control of the enactment or amendment of laws is not affected by the referendum provisions of the Constitution; the operation of a given law is alone affected by the referendum. It may or may not become effective, as the voters act. When they do act, the status of the law is fixed,

unless and until the Legislature, as it may, again acts with reference to the same subject matter.

Gen. St. 1919, c. 116, as amended by Gen. St. 1919, c. 326, will be in force December 4, 1919.

Very truly yours,

(Signed) HENRY A. WYMAN,
Attorney-General.

FURTHER DISCUSSION OF THE REFERENDUM.

The conclusion stated by the Attorney-General in the foregoing opinion seems unquestionably sound. There is nothing in the I. and R. Amendment or in the voluminous debates relating to it, which indicates the slightest intention of interfering with the continuity of the deliberative legislative function of the General Court of Massachusetts. Even where a law has been petitioned for and adopted on initiative petition without approval of the legislature, the legislature still has the power to amend or repeal it, for as stated in the I. and R. Amendment "subject to the veto power of the governor and to the right of referendum by petition as herein provided, the General Court may amend or repeal a law approved by the people."

The suggestion in the Attorney-General's opinion that "suspending the operation of the original act (by a referendum petition containing a suspension clause) suspended the operation of the amendment," raises an interesting question.

Since the amending act is subject to referendum petition like any other act, if a referendum petition, with or without a suspension clause, is not filed as to such amending act, is the operation of the amending act suspended by force of the referendum petition relating to the original act?

If the amending act is so interwoven in its provisions with the original act that it cannot reasonably stand alone, the suggestion of the Attorney-General would seem to be the sound, practical interpretation. If, on the other hand, the amendment of an earlier act is so distinct and separable a provision that it is clearly capable of standing alone as a separate law although it is drawn in the form of an amendment, a somewhat different question might arise.

It did not arise for decision in this Savings Bank Referen-

dum. It would have arisen if the popular vote on the original act had been in the negative. In that case, the question would have been, "is the substance of Section 1 and the whole of Section 2 of Chapter 326 of 1919 (the amending act) sufficiently distinct from the original act voted on by the people to become a law, regardless of the fate of the original act, and is the introductory language of amendment in Section 1 to be ignored as surplusage?"

On this question, the rule suggested in the Attorney-General's opinion that suspending the operation of the original act suspends the operation of an amendment, may be the best practical interpretation to avoid confusion but, as we are beginning to study the practical operation of this new constitutional machinery, perhaps the other possible interpretation under certain contingencies should be faced and studied by the members of the legislature and of the bar.

F. W. G.

THE QUESTION OF PRECEDENCE OF THE FEDERAL ESTATE TAX FURTHER CONSIDERED.

In the August number of the "Massachusetts Law Quarterly," the question was discussed whether the federal estate tax imposed by an act of congress, which is part of the supreme law of the land, takes precedence over the state inheritance taxes in such a way as to require deduction of the federal tax before computing the state tax on the residue. This question was discussed as a federal question which should ultimately be decided by the Supreme Court of the United States unless the present ruling of the New York Court of Appeals, refusing to allow the deduction, is reconsidered.

The suggestion in that discussion that there was a federal question involved has been disputed on the ground that the only question is as to the meaning of the New York statute and that is a question for the New York Court of Appeals to decide or, stating the matter more specifically, assume that the effect of the decision and opinion of the Appellate Division of the New York Supreme Court in the Sherman case, "with two dissents" affirmed without opinion by the New York Court of Appeals, interprets the New York transfer tax statute to say,

> "Our tax is to be such a fraction of the gross estate as is arrived at by making calculations in which the federal tax is not deducted."

How can there be a federal question if that is the substance of the New York statute as interpreted by the Court of Appeals? What is there in such a result, repugnant to the constitution or the laws of the United States within Sec. 1214 of the compiled statutes of the United States providing for writs of error to the Supreme Court?

This is a crucial question which must be faced. It is, perhaps, a complete answer to the suggestion that there is a federal question and it may be that the only hope of a decision on the merits which will fit the facts, as well as principles

of justice, lies in a reconsideration by the New York Court of Appeals of the rule laid down in the Sherman case.

The writer has not yet been able to satisfactorily answer the question. If any one else can furnish a convincing answer to establish the federal character of the question, the editor of this magazine will be glad to receive the answer and publish it.

If the question cannot be answered, there still remains the question of construction of the state statute as a question "of justice," to repeat the words of Judge Holmes, when he was Chief Justice of Massachusetts, which were referred to in the previous article.

The federal estate tax is a comparatively new act which has caused much discussion and difference of opinion. It does not seem so important a question should be finally disposed of in New York without an opinion by the New York Court of Appeals, especially in view of the fact that the opinion of the Appellate Division was a three to two decision in the Sherman case.

In connection with this question of construction of the New York transfer tax law, the following opinion of Judge Augustus N. Hand, in the Federal Court for the Southern District of New York, is interesting. In that case he decided that a New York transfer tax paid upon a legacy could not be deducted by the legatee in computing the federal income tax. In the opinion, Judge Hand refers to the somewhat varying language of the New York Court in explaining the nature of the transfer tax, as follows.

Extract from Judge Hand's Opinion.

"The plaintiff contends that the New York transfer taxes are excise taxes imposed by the state upon the right to receive an interest in a decendent's estate, and as such are within the deductions allowed by statute. The government, on the other hand, says that these taxes are an appropriation by the state of a portion of the decendent's estate before the remainder vests in the legatee. This latter contention is in accordance with the decision in United States v. Perkins, *163 U.S. 625, at page 630, 16 Sup. Ct. 1073, at page 1075* (*41 L. Ed. 287*), where the court said:

> 'The legacy becomes the property of the United States only after it has suffered a diminution to the amount of the tax, and it is only upon this condition that the Legislature assents to a bequest of it.'

"This decision, which so far as I know has not been questioned, cannot be reconciled with any theory that the tax is based on a right of succession already vested in the legatee.

"At the outset we have the important fact that property inherited or transmitted by will is not treated as income in the Income Tax act, but, on the contrary, is not only not included, but specifically exempted. In other words, in the hands of the legatee, devisee, heir, or distributee such property is capital and not income. Under these circumstances, it would seem inconsistent if charges against this capital, which accrued prior to, or simultaneously with, the devolution of it, could be deducted from income tax returns. Notwithstanding this, the language of the act would apparently make the transfer taxes a necessary deduction, if they are charges against the person receiving the property, or against either the property or the right accruing to him.

"The cases are extremely confused and their reasoning is unsatisfactory. It is admitted by them all that the tax is not upon the property itself which is transmitted. To avoid the unconstitutionality of a direct tax upon the property itself which was not apportioned among the states, the Court of Appeals of New York said as to the federal tax of 1898, in Matter of Gihon, *169 N.Y. 443, 62 N.E. 561*:

> 'The full amount of the legacy is in law paid to the legatee, and the deduction made from it and paid to the state or federal government is paid on account of the legacy which he receives.'

"It is argued that the personal liability of the executor or administrator under the New York law for the payment of the tax makes the view taken by the foregoing case erroneous; but, as Judge Cullen there said, the obligation of the executor or administrator to pay the tax is a mere rule of administration to insure its payment, and the imposition of such an

obligation affords no proof that the tax is either on the right to transmit or upon the property itself.

"I do not think it follows, because the right to transmit or the right to receive the property of a decendent is a privilege granted by the state, and not a common right, that the tax is imposed upon either right. Judge Gray's statement in Matter of Swift, *137 N.Y. 77 N.E. 1096, 18 L.R.A. 709,* is an accurate description of what occurs:

> 'What has the state done, in effect, by the enactment of this tax law? It reaches out and appropriates for its use a portion of the property at the moment of its owner's decease, allowing only the balance to pass in the way directed by the testator, or permitted by its intestate law.'

"To say that the legatee, devisee, heir, or distributee receives the property without any deduction and then pays the tax is really a most artificial way of viewing the transaction. In the case of personal property he really only gets the balance, with a credit as a matter of convenient bookkeeping to the amount of the tax. In the case of real estate he receives properly speaking an equity. He can pay the tax and get the land freed from the incumbrance, or the state can foreclose the lien and he will receive the balance. In either case the only natural way to treat him is as a recipient of a net amount. The condition of the devolution of the property is the receipt of the transfer tax by the state.

"In United States v. Perkins, *163 U.S. 625, 16 Sup. Ct. 1073, 41 L. Ed. 287,* the testator bequeathed his property to the United States. The Supreme Court held that the New York transfer tax was upon the testator's right to dispose of his property, and thus sustained the tax for, if it had been treated as upon any right of succession of the United States, the tax could not have been lawfully imposed. This case has been cited with approval in New York decisions, both under the old and new transfer tax acts.

"I have carefully examined the interesting briefs submitted by counsel, and am convinced that the tax cannot properly be regarded as an imposition upon either the property or the right to receive a gross amount of the property of a decendent represented by a legacy, devise, or distributive share, but

that the property and the right to receive it passed, reduced by the amount of the tax measured by a percentage of the value of the gross share. It is impossible to reconcile the conflicting expressions in judicial opinions; but this treatment of the situation will, I think, accord with the results reached by the various cases. I can see no substantial difference between the New York Transfer Tax Act (Consol. Laws, c. 60, 220-245) in operation in 1913, and the earlier act, and I do not regard any of the acts as imposing a tax upon the plaintiff's right of succession which is deductible in her income tax return."

Now if, as Judge Hand says, the New York tax cuts out a part of the inheritance before it reaches the legatee or next of kin and if, as every one seems to agree, the federal estate tax cuts out a portion of the entire estate before it reaches anybody whether legatee, next of kin, executor or administrator, is it a sound or a just construction of the New York statute to say that the federal government has not reduced the amount of the estate upon which the New York statute acts, and to suggest, as was suggested by Judge Lyon in the opinion in the Appellate Division in the Sherman case, a doubt whether the federal government could constitutionally reduce the amount of the estate upon which the New York statute operates?

Suppose the act of congress had said in so many words the federal estate tax hereby imposed is intended as an excise, or cutting out, from the entire estate of an amount which *shall* be deducted before any similar taxes are imposed by the state. Could congress say this effectively under the federal constitution as part of the supreme law of the land binding upon the State of New York? Has it said so? The question whether it has said so seems to be a federal question as to the proper interpretation of the federal statute imposing the estate tax. If it has said so, the question whether it can say so legally seems to be a federal question under the Constitution of the United States. On this question of power, while it has been decided that "excises," etc., *must* be "uniform" only in a geographical sense, I do not understand that Congress cannot so provide that they *shall* be uniform in some

other sense. Has not Congress the power to protect from double taxation in this way even if not required to do so?

Perhaps these are the real federal questions which may arise, the only other question being whether the New York Court will continue to construe the state statute as ignoring the federal tax as a proper deduction, regardless of the unjust results which follow that decision, when the practice in other states, as in Massachusetts, for instance, allows the federal tax as a reasonable and a proper deduction.

F. W. G.

Might not the National Conference of Commissioners on Uniform State Laws do a valuable service by recommending to all the states that the federal estate tax should be deducted uniformly in all states?

THE SUGGESTIONS OF THE SECRETARY OF THE TREASURY, RELATIVE TO TRANSFERS "IN CONTEMPLATION OF DEATH," IN THE FEDERAL ESTATE TAX.—A PROTEST.

In a pamphlet entitled "Notes on the Revenue Act of 1918, Submitted by the Secretary of the Treasury," on November 3, 1919, "*Without Recommendation at this Time,*" to the Committee on Ways and Means of the House of Representatives in Washington and printed for the use of that committee, the following suggestions appear on pages 24-25 of Part 1.

"TITLE IV.—ESTATE TAX.

Section 402 (c). Transfer of property in contemplation of death.

This paragraph of the law provides for the inclusion in the gross estate of a decedent of the value of property of which he has made transfer 'in contemplation of death.'

It has been suggested that this part of the law should be amended in the following three ways:

1. By defining the words 'contemplation of death' in the manner in which these words are defined in the California statute. The California statute reads as follows:

> The words 'contemplation of death,' as used in this act, shall be taken to include that expectancy of death which actuates the mind of a person on the execution of his will, and in nowise shall said words be limited and restricted to that expectancy of death which actuates the mind of a person making a gift *causa mortis*; and it is hereby declared to be the intent and purpose of this act to tax any and all transfers which are made in lieu of or to avoid the passing of property transferred by testator or intestate laws. (Stats. of Cal., 1913, chap. 595, sec. 1, subd. (f).)

Nevada has a similar statute (Stats. of Nev., 1913, chap. 266, sec. 30).

2. To extend the present prima facie presumption of taxability so as to include transfers made within six years of the decedent's death.

Wisconsin has a statute of this kind. It reads as follows:

A tax shall be, and is hereby, imposed upon any transfer of property, real, personal, or mixed, or any interest therein, or income therefrom in trust or otherwise, to any person, association, or corporation, within the State.

. . . . . .

When the transfer is of property made by a resident or by a nonresident when such nonresident's property is within this State, or within its jurisdiction, by deed, grant, bargain, sale or gift, made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after such death. Every transfer by deed, grant, bargain, sale or gift, made within six years prior to the death of the grantor, vendor or donor, of a material part of his estate, or in the nature of a final disposition or distribution thereof, and without an adequate valuable consideration, shall be construed to have been made in contemplation of death within the meaning of this section. (Stats. of Wis., chap. 48b, sec. 1087.)

3. To make absolute the presumption that any transfer has been made in contemplation of death if the conveyance was made within two years of death.

Indiana has a statute of this kind. It reads as follows:

Provided, That any conveyance, gift, or transfer made within two years of the death of any decedent, without consideration, save and except love and affection, shall be conclusively presumed to have been made in contemplation of death. (Burn's Ann. Ind. Stats., sec. 10143a, subd. 4.)

. . . . . .

It has been suggested that these changes could be accomplished by an amendment in substantially the following form:

Strike out subdivision (c) of section 402 and insert:

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except in case of a bona fide sale for a fair consideration in money or money's worth.

The words 'contemplation of death,' as used in this section, shall be taken to include that expectancy of death which actuates the mind of a person on the execution of his will, and in nowise shall such words be limited and restricted to that expectancy of death which actuates the mind of a person making a gift causa mortis; and it is hereby declared to be the intent and purpose of this title to tax any and all transfers which are made in lieu of or to avoid the passing of property transferred by testate or intestate laws. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within six years prior to his death, except in the case of a bona fide sale for a fair consideration in money or money's worth, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title. Any transfer made within two years of the death of any decedent without consideration, save and except love and affection, shall be conclusively presumed to have been made in contemplation of death.''

DISCUSSION OF THE SUGGESTIONS.

I respectfully submit that the foregoing suggestions, if adopted, would be bad law and worse policy.

The subject of gifts "in contemplation of death" was quite fully discussed in the "Massachusetts Law Quarterly" for February, 1919, page 157, and the suggestion was made, for the reasons there stated, that:

> "The fundamental principles of constitutional law and the cardinal rule of statutory construction produce the result that the phrases, 'made in contemplation of death' and 'made or intended to take effect in possession or enjoyment at or after his death' are synonymous, as suggested by the passage in Judge White's opinion; that they both deal with a transfer that has a 'string' of some kind to it, and that neither of them applies to absolute gifts intended to take effect forthwith in possession and enjoyment during the life of the grantor without any 'string' attached in the form of a trust or otherwise.
>
> "If this conclusion is correct, the Secretary of the Treasury, of course, has no authority to extend the meaning of the statute by his regulations and the meaning of the regulations must be interpreted in the same manner as the statute."

It was also suggested that if the words "in contemplation of death" were construed in such a way as to apply to completed gifts inter vivos it was unconstitutional.

The suggestions, submitted by the Secretary of the Treasury, above quoted if adopted would extend still further this objectionable provision and would extend the inquisitorial requirements of the form of return for the federal estate tax as revised in August, 1919, accordingly.

The Question of Policy.

As pointed out in the discussion in this magazine, above referred to, while the attempt to impose this tax is contained in a statute providing for an "estate tax," yet, it is a very different kind of tax. The estate tax is a duty or an excise based upon the privilege of transferring property by death regardless of motive. The tax on completed gifts cannot be based upon this privilege and, if it is to be sustained, some other theory must be invented to sustain it.

The attitude in which this matter is approached by tax officials is disclosed in the last sentence in the suggested amendment of the law which reads as follows:

> "Any transfer made within two years of the death of any decedent without consideration save and except *love and affection* shall be *conclusively* presumed to have been made in contemplation of death."

In the earlier suggestion the *prima facie* presumption is to include transfers made within six years of death.

Nothing in this discussion is intended as an attack upon the federal tax officials. They are doing their duty by the government and it is natural that under the necessity of raising funds all available methods of extracting them through the taxing power should be considered, but their enthusiasm for this form of taxation seems misguided.

The skinflint who sells his property and gets the last cent or more out of it and then squanders the proceeds or uses them in anything but a generous manner is not to be taxed upon his transfers; but the generous man who because "of love and affection" wishes to give his children or his wife or his friends some property while he is alive so that he may have the pleas-

ure of seeing them enjoy it as well as of knowing that they may enjoy it later is to be taxed because he gives expression to his generous impulse.

Was there ever a more outrageous basis for imposing a tax than the impulse of "love and affection?" Is it good policy thus to penalize generosity in a government of free men?

The practical expression of love and affection by giving has generally been considered hitherto as a thing to be encouraged on the authority of the Founder of Christianity.

Are Americans in the twentieth century to tax the expression of this Christian motive by assuming the role of Cæsar and requiring the giver to render something because he wants to express his "love and affection?" Is not the *power of giving*, the best incident of the institution of private property and is it good law, good morals, or good policy to attempt to circumscribe and limit this most valuable incident of the right of private property? Is the right of property to be a purely mercenary right in a world "made safe for democracy?" Is there any more christian charity involved in a gift to a hospital or an educational institution which happens to be incorporated or to have some other artificial collective character, than in a gift to a wife, a child, or a friend or to some worthy individual who is not an incorporated institution but who needs help? Is there anything immoral, unnatural, or undesirable in any way in a man making such a gift even if he knows and is glad to know that the person to whom he makes the gift will get the benefit of all of it without deduction of taxes? Is it not a shocking prospect if no charitable person can be generous while he is alive without precipitating upon his death a disgusting controversy with some administrative tax official who as a practical matter is to have the power to decide just how much "love and affection" or other charitable impulse entered into the gifts made and just how much those motives were affected by the knowledge that the property would not be taxed upon death?

Many people are shocked sometimes now by the distressing inquisition involved in contested will cases as to the private life, opinions, feelings, etc., of the person whose will is contested. Is it good policy to provide that such an inquisition shall be established by the government in the case of every person who dies in the United States after having made a gift during his life time?

Is the inquisitorial policy to be extended so that there will be no privacy even of feeling for law-abiding citizens in America? Must every executor or administrator cross examine every bereaved family as to every minute detail of feeling or expression of feeling from time to time during a long period of years of the person who has died, in order to make an affidavit based on all the uncertainties of evidence regardless of the possible change of feeling from time to time, and is the same bereaved family then to be subjected to further cross examination by some suspicious tax gatherer who wants to find out just how much or how little love and affection or other motive may have influenced the deceased giver?

There seems to be a vague idea that the government has a right to expect a man to keep all the property which he has at any time during his life, and particularly during the last two or six years of his life, or its money equivalent in case of any transfer, so that the government can tax it when he dies. This theory which appears to be behind this kind of taxation yields the right of the government if a man loses his money in business, in stock gambling or in any other method of creating a deficit, but it does not recognize in any way whatsoever a man's right to give anything away, no matter how careful or how successful or how generous he may be.

The practical application of this theory of taxation is not approached directly with that intellectual honesty which seems desirable in such matters. It is not proposed as an act of congress to tax every transfer of property.

It is absurd to attempt, by the use of a statutory presumption, whether absolute or *prima facie,* to cast an artificial shadow of death over the last two or six years of a man's life so that, no matter what his age or circumstances, he cannot deal with his property with any certainty and nobody else can accept from him and use property unless they buy it without the uncertainty of some future tax descending upon it.

I submit that the whole scheme of taxing completed gifts by a man of his own property during his life, while the man who sells his property is not taxed, is an arbitrary proceeding which violates the principles of law, morals, justice, and expediency.

Men will differ as to soundness and fairness of the policy

of some of the estate and inheritance taxes now in force in this country which take money away from a man's wife and children when they need it most. But, whatever may be thought of that policy, this attempt to extend it to completed acts, inspired either in part or in whole by motives of generosity, ought to stop in a country in which the most important object is the encouragement of the best that there is in the character of its individual citizens.

Discussion of the Law.

It may be said that the foregoing remarks are directed to the question of policy rather than of constitutional law, and it is true that there are some legislative precedents in support of some such provisions, but there is no clear decision, as far as I am aware, of the Supreme Court of the United States directly supporting the provision either in the existing law or that suggested by the Secretary of the Treasury.

In the Internal Revenue Act of 1864, Chapter 173, there appeared the following provisions relative to conveyances of real estate. That act proposed certain duties on "successions" and Section 132 was as follows:

> "Sec. 132 *And be it further enacted,* That if any person shall, by deed or gift, or other assurance of title, made without valuable and adequate consideration, and purporting to vest the estate either immediately or in the future, whether or not accompanied by the possession, convey any real estate to any person, such disposition shall be held and taken to confer upon the grantee a succession within the meaning of this act."

This act so far as a succession tax in general was concerned came before the court in *Scholey* v. *Rew,* 23 Wall. 331, and was sustained. A tax upon a "succession" arising from a provision under a will which took effect before the statute also appears to have been considered in *Wright* v. *Blakeslee,* 101 U.S. 174. But no constitutional question was discussed and there appears to be no decision sustaining a tax on a completed transfer *inter vivos* when the entire beneficial interest passes absolutely without reservation and without any postponement of interest of any kind. As far as Section 132

of the Act of 1864 goes to that extent, it seems open to the same objections urged against the present regulations of the Secretary of the Treasury and his proposal for the amendment of the Act of congress.

It is true that the court has decided that the uniformity required in the imposition of excises, etc., by congress is a geographical uniformity but, as pointed out in the previous discussion in the February number of this magazine, there still is left the question of arbitrary discrimination based upon immaterial facts, and the opinion of the court in *Knowlton* v. *Moore* left such questions to be decided when they arose.

The Real Question of Law.

It is obviously not the transfer which is taxed by the present regulations of the Secretary of the Treasury or his proposed amendment. If it were, the tax would be collectible and collected when the transfer was made as in the case of a tax on the sale of a tube of tooth paste or any other article under the present revenue law. There is no rate of taxation by which the amount of the tax could be ascertained when the transfer is made. The question whether there is any tax to be claimed and if so at what rate does not arise until the man dies and it appears that his estate exceeds $50,000, etc., and then the tax is sought to be imposed by including the amount of the transfer in the "gross estate." Such an indirect sneaking trap cannot by any reasonably honest use of words be argued into a tax on the transfer because a tax which has only a contingent existence until a death which has no connection with the transfer cannot be a tax on the transfer. It is a tax on the death: and death is not a taxable privilege within the control of the United States or any other government. It is a privilege granted by the Almighty.

This is the fatal weakness in the government's case in this matter. It is nothing more nor less than an attempt to tax death without regard to its effect on any property. All the rest of the objections may perhaps be called objections to the policy: but this is a question of constitutional law.

Can the government tax death? Can it measure the tax by property which the deceased does not have when he dies?

I deny the existence of such a power. If a man gets rid of his property by selling it and spending the proceeds on himself and then dies, he is not taxed. If he gets rid of it by spending it on someone else by giving and dies, he is taxed. That is not taxation at all.

It is not a "tax," a "duty," an "impost," or an "excise" within the delegated powers of congress. It is disguised extortion or taking of property without due process, without compensation, and in violation of the Fifth Amendment. It is "an arbitrary and confiscatory excise . . . bearing the guise of a tax" which calls for "a remedy by applying inherent and fundamental principles for the protection of the individual," to quote the words of Judge White from *Knowlton* v. *Moore*, 178 U.S. at 109.

F. W. GRINNELL.

The foregoing is written to provoke discussion. If any one wishes to answer the suggestions made, or to discuss the subject from other angles, the editor will be glad to receive such discussions.

F. W. G.

LIMITATIONS ON THE KIND OF AMENDMENTS TO THE FEDERAL CONSTITUTION PROVIDED FOR BY ARTICLE V—THE RHODE ISLAND CASE—THE VIEWS OF GEORGE TICKNOR CURTIS—THE ORIGIN OF THE TENTH AMENDMENT.

This problem is discussed in an interesting and a suggestive manner in three recent articles, one entitled "The Limitations on the Amending Power" by William L. Marbury, Esq., of Baltimore, which appears in the December number of the "Harvard Law Review," another entitled "Is There an Eighteenth Amendment?" by Justin DuPratt White, Esq., of New York, in the January number of the "Cornell Law Quarterly," and a third entitled "Intrinsic Limitations on the Power of Constitutional Amendment," by George D. Skinner in the Michigan Law Review for January, 1920. The conception of the federal constitution suggested by these articles is not one which is familiar to most members of the bar because there has been no special occasion hitherto which attracted attention to it.

In Marshall's day, the question arose whether there was to be any strength in the federal government as against the powers of the states. In the Civil War, this question was tried out and the power of the people of the United States, as expressed through the federal government was sustained. While in Marshall's day the question was whether the federal government would come into practical existence in the face of state opposition, now the question is beginning to arise the other end up—whether the federal government may be made to gradually absorb the states by absorbing their powers. The problem is to find the sound balance between the powers.

As suggested in the article by Mr. White in the "Cornell Law Quarterly" above referred to, the answer to the question must rest upon a *principle* rather than upon some purely arbitrary line. The principle involved, of course, is the principle of local self-government.

The striking fact about the prohibition amendment, is not only that the legislatures of three states have failed to ratify it and an immediate problem of enforcement in those states

arises, but that a proceeding has been instituted by the state of Rhode Island to test the validity of the amendment. The real nature of the question presented by the Rhode Island case is not generally understood, either by the bar or by the public. It is commonly considered to concern merely the question of prohibition, but the printed bill annexed to the motion made in the Supreme Court of the United States by the Attorney General of Rhode Island pursuant to a vote of the legislature of that state, shows a very much larger question.

In order to demonstrate the fact that the idea as to the limitations upon the kind of amendment provided for by Article V is not an idea suddenly and recently born of a national thirst for prohibited liquor, the following extracts are reprinted for the information of the bar from Chapter VI of the second volume of the "Constitutional History of the United States," by George Ticknor Curtis, a volume which has not only the authority of his name, but also the added authority of having been prepared for the press by the late James C. Carter, as Mr. Curtis died before this volume could be published.

The volume was published in 1896.

Mr. Curtis was a son of Massachusetts who was born in Watertown in 1812. He was the brother of Benjamin R. Curtis, the judge who wrote the dissenting opinion in the "Dred Scott" case.

EXTRACT FROM CHAPTER VI, VOL. II OF "CONSTITUTIONAL HISTORY OF THE UNITED STATES."

By GEORGE TICKNOR CURTIS.

"One of the most important subjects that can engage the attention of the statesmen and people of this country is the extent and scope of the power to amend the Constitution of the United States. Very little aid on this subject can be derived from the mode in which the constitution of a state may be amended; for the Constitution of the United States contains in itself a positive text, which at once prescribes the mode in which it may be amended, and limits the power of amendment.

In considering this text, however—Article V. of the Constitution—it is necessary also to consider the force and oper-

ation of the Ninth and Tenth Amendments, because they may have some bearing upon the original article which embraces the amending power.

The public bodies which are to be the agents for amending the Constitution are those which are authorized to propose amendments, and those which are authorized to adopt them and make them a part of the instrument.

The first of these are the two houses of Congress, acting by a two-thirds vote of each, or a convention of all the states, called by the Congress on the application of the legislatures of two-thirds of the several states. The ratifying bodies in either case are the legislatures of three-fourths of the several states, or conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress. Thus it appears that two-thirds of both houses of Congress may propose amendments, or the legislatures of two-thirds of the several states may apply to have a convention of all the states called for the proposing of amendments, in which case the Congress must make the call; and it further appears that the amendments, when proposed by either form of action, may be ratified by the legislatures of three-fourths of the states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be directed by the Congress when the amendments are proposed. So that there may be one-fourth of the several states that must submit to the will of three-fourths thereof, if the three-fourths ratify any amendment that has been constitutionally proposed, although the one-fourth may not accede to it. This is a great and far-reaching power, but it is carefully defined and regulated; and the question arises, What, if any, are its limitations? What is to secure the constitutional minority of the states from an exercise of power by the constitutional majority that will prostrate their state sovereignties and destroy their autonomy?

It will be observed that the amending power is not a power to be exercised by a majority of the people of the United States, acting as a mass of individuals, or as a collective people. It is to be exercised by three-fourths of the states, a constitutional majority of the members of the Union fixed for this special purpose. It may thus happen that a proposed amendment would be ratified by a less num-

ber than a majority of the people of all the states, because of the mode of ratification and the fixed constitutional number of the state legislatures or state conventions which would have the power to ratify it.

All this shows, on the one hand, how careful the framers of the Constitution were, in shaping the amending power, to preserve the state sovereignties; and, on the other hand, how far their system removes the amending power from the action of the people of the United States regarded as a nation.

No one can read the ten amendments of the Constitution which were prepared by the First Congress in 1789, and were ratified by the states in 1789-91, without perceiving how necessary they were to supplement the instrument that came from the Convention of 1787, and was adopted in 1787-88. In the first volume of this work I have explained the jealousy that was felt by the people of many of the states against the establishment of such a government as the one proposed, without express safeguards to protect the rights of states and of individuals. That this jealousy was a reasonable one is apparent from the preamble of the resolution by which the First Congress proposed twelve articles of amendment to the consideration of the state legislatures. (Although twelve amendments were proposed, ten only were ratified by the requisite number of states.)

The preamble recited that "the conventions of a number of the states had, at the time of ratifying the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declarative and restrictive clauses should be added; and that extending the ground of public confidence in the government would best insure the beneficent ends of its institution." This explains the reasons which actuated the First Congress in proposing amendments, and furnishes the key to the whole proceeding.

It is not necessary to notice here the various amendments that were asked for by the states when they communicated to Congress their several ratifications of the Constitution. They embraced many subjects, and some of them proposed modifications of the framework of the government. It was for the Congress, in the exercise of its authority, to shape the amendments for the consideration of the state legisla-

tures, to make a judicious selection of the matters to which they were to relate. When we look into those which were proposed and adopted, we can see that they were really needed to secure public confidence in the new government. Hamilton was not often wrong in his views of the Constitution as it came from the hands of its founders, and in the reasons which he assigned in The Federalist (No. 84) why any further Bill of Rights than the Constitution itself was not necessary, he was theoretically right. A Bill of Rights was necessary, however, in the sense that what is in the highest degree expedient is necessary. Such an addition would relate, not the framework of the government, but to the rights of individuals or of the people, and the rights of states; and although these rights might be said to be exposed to no danger from the exercise of the powers which the Constitution was to vest in the new government, it was, nevertheless, considered important that some express security should be extended to them. For example, the Constitution had not expressly or by implication authorized the Congress to make a law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press or the right of the people peaceably to assemble and to petition the government for a redress of grievances. It might be said that powers of legislation which were not enumerated in the Constitution would never be exercised. But this was not enough to satisfy those who looked at the whole mass of powers which were plainly granted in the Constitution, and saw in them a government which was to have the force of a majority of the people of the states and of the states also, and which was to possess an unlimited power of taxation. Minorities, they said, must be protected; majorities can protect themselves. We have since had abundant reason to be convinced of the soundness of this reasoning. We have had a civil war, in the prosecution of which powers were exercised that had to be judicially brought to the test of one or more of the ten amendments which were incorporated into the Constitution immediately after its ratification.

In answering those who desired provisions in the nature of a Bill of Rights, Hamilton pointed out that the Constitution contained a number of such provisions. He instanced

those which limited the effect of judgment in cases of impeachment; the suspension of the habeas corpus only when the public safety required it in cases of rebellion or invasion; the prohibitions against bills of attainder, and ex post facto laws, and titles of nobility; trial by jury in all cases of crime; the definition of treason, and the nature of the proof required for conviction; and the limitation of an attainder of treason so as not to work corruption of blood or forfeiture except during the lift of the person attainted. Important as these were—and their importance was adverted to by Hamilton with his usual perspicacity—they did not constitute that full and sufficient Bill of Rights which was demanded by a large number of the states. They did not secure the rights of persons as they were provided for in eight of the amendments, and, above all, they did not reach the very important declarations contained in the ninth and tenth.

In justice to Hamilton, it should be observed that he wrote and published the eighty-fourth number of The Federalist principally for the purpose of encountering those who insisted that the Constitution should be amended before it was put into operation. Every one can concur in this great man's general definition of bills of rights; that 'they are, in their origin, stipulations between kings and their subjects, abridgements of prerogative in favor of privilege, reservations of rights not surrendered to the prince.' But to his conclusion one cannot so readily assent. 'It is evident, therefore,' he said, 'that according to their primitive signification, they have no application to constitutions professedly founded upon the power of the people, and executed by their immediate representatives and servants. Here, in strictness, the people surrender nothing; and as they retain everything, they have no need of particular reservations.'

The Constitution proposed by the Convention of 1787 was undoubtedly founded on the power of the people of the states. It was equally true that it was to be executed by their immediate representatives and servants, that the people surrended nothing and retained everything. Still, they might have need of particular reservations, and of that need they were to judge.

The Constitution proposed the establishment of a great government; and although this government was to be a crea-

tion proceeding from the people of the several states, and was not like the situation of a prince who claims powers and prerogatives that he does not take hold of the people, yet it was not the less necessary to make particular reservations, lest the inference might be drawn that what was not prohibited might be presumed to have been granted.

. . . . . .

The ten amendments finally prepared and submitted to the state legislatures were evolved out of numerous propositions, all of which evince the necessity for guarding against the effect of the doctrine of implication in exercising the powers conferred.

These ten amendments, adopted by the requisite number of states then composing the Union, took effect after the Constitution had been put into operation.

According to the express terms of the amending power (Article V. of the Constitution) they 'became valid, to all intents and purposes, as part of this Constitution,' by force of their adoption by the requisite number of states. They are, therefore, to be read as if they had been originally incorporated in the text of the Constitution, after the close of Article VII.

. . . . . .

It is proper to observe here that the first ten amendments, unlike some of those which were adopted at a much later period, were designed as restraints imposed on the Federal Government, and not on the state governments. The whole tenor of these texts, and the contemporaneous history, show that they had their origin in the fear that in the powers granted by the Constitution to the government of the United States the safety of the states and their people had not been sufficiently guarded. Designed as restrictive and explanatory clauses, to apply to the powers granted to that government, their language is susceptible of no other meaning. Accordingly, it has been repeatedly held by the Supreme Court of the United States that none of them affects the conditions of the states, or the powers which the states or their people may rightfully exercise.

The powers which the states may not rightfully exercise, according to the original Constitution, as it first took effect,

were those which were subjected to the prohibitions expressly laid upon every state by Article I., Section 10. These are the prohibitions referred to in Amendment X., which reserves to the states respectively, or to the people, all powers which had not been so prohibited, and all which had not been delegated to the United States. (The language of the Tenth Amendment is peculiar in one respect; but it is not, in my opinion, susceptible of the interpretation sometimes given to it. It reserves 'to the states or to the people' the powers not delegated by the Constitution to the United States, or not prohibited by it to the states. This means, as I apprehend, not the people of the United States, regarded as a mass, but the people of the several states. The 'people of the United States,' regarded as a nation, have no powers of government—they have the power to make a *revolution*. The reservation is to the *states* or to their *people*. The reason for using both terms 'the states' and 'the people' was that the states, as organized by their constitutions, might not lose all the powers which their 'people' have).

At a subsequent period, when the Thirteenth, Fourteenth, and Fifteenth Amendments were adopted, other prohibitions were added which restrained the states in the exercise of certain powers that they previously had. Whenever, therefore, it is sought, in a judicial or any other proceeding, to show that a state is restrained by the Constitution, as now amended, from exercising any power which the original text of the Constitution did not prohibit, the restraint must be found in one of the amendments adopted in 1879 or subsequently. For all other restraints on the state powers the inquirer must consult Article I., Section 10, of the Constitution as it was originally framed and adopted. The Ninth and Tenth Amendments are in themselves express fundamental provisions, fixing immutably the reserved rights of the states. If three fourths of the states were to undertake to repeal them, or to remove them from their place in the foundations of the Union, it would be equivalent to a revolution. There would remain nothing but the dominant force of three-fourths of the physical force of the nation, to be followed by a different system of government of a despotic character.

It seems to me, therefore, that while it is within the amend-

ing power to change the framework of the government in some respects, it is not within that power to deprive any state, without its own consent, of any rights of self-government which it did not cede to the United States by the Constitution, or which the Constitution did not prohibit it from exercising. In other words, I think the power of amending the Constitution was intended to apply to amendments which would modify the mode of carrying into effect the original provisions and powers of the Constitution, but not to enable three fourths of the states to grasp new power at the expense of any unwilling state.

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The true answer to this question, I think, is to be found in the *Ninth* and *Tenth* of the first amendments; for I cannot interpret those amendments as meaning anything less than reservation to the several states of all powers of government which they had not granted to the United States by the Constitution, or which the Constitution had not prohibited them from exercising.

I conclude, therefore, that there are rights of the several states of which they cannot be deprived by an amendment to the Constitution besides their right to equal suffrage in the Senate. We must consider whether a proposed amendment would relate only to the structure of the government, or whether it would relate to some right of the people of a state which was not touched by the original Constitution, and which the states meant to reserve, and did reserve, by the Ninth and Tenth of the amendments. These amendments have certain clauses as applicable to the amending as to all the other powers embraced in the Constitution. It is quite true that the *amending* power is not a power to be exercised by the government of the United States as that government exercises its powers of legislation. It is a specific power, vested as a final authority in three fourths of the states. But when we come to inquire whether three fourths of the states can, by amending the Constitution, deprive any state of a right of which the Constitution did not deprive it, as it was first adopted, we must, I think, reach the conclusions which I have indicated.

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It follows, as a necessary consequence of this system, that the people of every state in this Union have under their entire control every relation of their inhabitants that is not under the control of the United States by reason of some provision in the Federal Constitution. With the domestic relations of their inhabitants the states can deal as they see fit.

There is another marked and prominent characteristic of our political system evinced by the provisions of the Federal Constitution. It is that each state, by and through that Constitution, enters into compacts and agreements with all the others. They are prohibited from making agreements with each other without the consent of Congress; but they may and do covenant perpetually and irrevocably, by and through the Constitution of the United States, that the Federal Government shall have and exercise all the powers ceded to it by their assent to the Constitution, and that no state shall exercise any power prohibited to it by that instrument. The idea, therefore, of compacts, covenants, and agreements between the separate states, as members of the Union, and the United States as the representative of all the states collectively, is embedded in the Federal Constitution and forms its principal strength. It is what gave the Federal Government authority to vindicate and assert its own existence and powers against an attempt of certain states to break the compacts which they had respectively made with the United States when they ratified and adopted the Constitution."

THE ORIGIN OF THE TENTH AMENDMENT.

Supplementing the emphasis placed upon the Tenth Amendment in the foregoing discussion by Mr. Curtis, the bar, and particularly the Massachusetts bar, will be interested in the following extract from the "Memoir of Theophilus Parsons," prepared by his son in 1859.

The substance of the Tenth Amendment appears to have been formulated as the first of the amendments proposed by John Hancock, president of the Massachusetts Convention of 1788, which ratified the federal constitution. These amendments, as is generally known, were adopted by the Massachusetts Convention not as conditions of ratification,

but as recommendations to the first congress to be held under the constitution after ratification.

It is generally understood, also that, while these amendments were proposed to the convention by Hancock, they were drafted by Parsons. The draft of the first amendment thus proposed was as follows:

> "And it is the opinion of this Convention that certain amendments and alterations in the said Constitution would remove the fears and quiet the apprehension of many of the good people of this Commonwealth, and more effectually guard against an undue administration of the federal government; the Convention do therefore recommend that the following alterations and provisions be introduced into the said Constitution:
>
> First. That it be explicitly declared, that all powers not expressly delegated to Congress are reserved to the several States, to be by them exercised."

As to these proposals and his father's views in regard to them, Professor Parsons speaks as follows, on pages 74 and 75 of the Memoir:

> "It is now quite certain that very few persons indeed, if any, were perfectly satisfied with the Constitution as originally adopted by the Convention at Philadelphia, and by them offered to the States. They who were most earnestly desirous that it should be accepted by the States were, perhaps, the most profoundly convinced that it had great defects. It would be an entire mistake to suppose that, because Cabot, Ames, Strong, and others, with my father, were ready to vote for it as it stood, and to do everything in their power to secure its adoption, they did not see its defects, or did they desire to supply them. The Constitution as offered was infinitely better than none; and rather than peril its adoption, they would have accepted it just as it was, and succeeded so far in exciting this feeling in the Massachusetts Convention, that a proposition to make the amendments a part of the Constitution as adopted by this State was voted down, and the Constitution was adopted as it was offered, leaving the amendments to be afterwards acted upon by the States. It must not be supposed, therefore,

that my father merely reduced to writing what others desired, and he did not desire. On the contrary, no one was more solicitous than he was that some of them—I may name the first one especially,—should be added to the Constitution."

. . . . . .

"There could, at all events, be no greater mistake than that of supposing these amendments to be mere trivialities, with which a trick was played to preserve things of value. The fact is very far otherwise. The first of them has become, it is not too much to say, the very keystone of the national Constitution. It is that in which it is declared, that 'all powers not expressly delegated by the aforesaid Constitution, are reserved to the several States.' This provision now sets limits to all its other provisions, and is constantly invoked in the consideration of other important clauses. It was not in the original Constitution, but was written by my father, and placed at the head of those amendments which were put by him into Hancock's hands, and in this way made the means of saving the whole. Being adopted by Massachusetts, it was proposed by Congress to the other States (under the fifth article of the original Constitution); and its value and necessity being at once perceived, it was immediately accepted by the requisite number of States, and was so incorporated into the Constitution."

Turning now to the debate in the Virginia Convention in 1788, the most powerful leader against ratification was Patrick Henry. Later in his life, after the constitution had been ratified, and the first ten amendments had been adopted, Henry became reconciled to the idea of the federal government and he appears to have been seriously considered, at one time, as a candidate for the presidency to succeed Washington (see Beveridge's "Marshall," Vol. II, pp. 156-158), but in the Virginia Convention he was the most fiery opponent of ratification.

Among other objections, which were later met by the adoption of the first ten amendments, there appeared the following in a passage quoted in Beveridge's "John Marshall," (Volume I, pages 439-440):

> "The debate then turned upon amending the constitution by a Bill of Rights, the Constitutionalists asserting that such an amendment was not necessary, and the opposition that it was absolutely essential. The question was 'whether rights not given up were reserved?' Henry, as usual, was vivid. He thought that, without a Bill of Rights, 'excisemen may come in multitudes . . . go into your cellars and rooms, and search, and ransack, and measure, everything you eat, drink, and wear.'"

In another passage which is peculiarly striking in view of the later discussion about the subject, which still continues, Patrick Henry, the great popular orator of the Revolution, spoke as follows in opposition to the federal constitution. (See Beveridge's "Marshall," Volume I, page 430). Referring to the action of the state courts of Virginia, he said:

> "Yes, sir, our judges opposed the acts of the legislature. We have this landmark to guide us. They had the fortitude to declare that they were the judiciary and would oppose unconstitutional acts. Are you sure your federal judiciary will act thus? Is that judiciary as well constructed, and as independent of the other branches, as our state judiciary? Where are your landmarks in this government? I will be bold to say you cannot find any in it. I take it as the highest encomium on this country (Virginia) that the acts of the legislature, if unconstitutional, are liable to be opposed by the judiciary."

—and John Marshall answered him later in the debate (see p. 452) as follows:

> "Mason's point, that the jurisdiction of National Courts would extend to all cases, was absurd, argued Marshall. For 'has the government of the United States power to make laws on every subject? . . . Can Congress 'go beyond the delegated powers?' Certainly not. Here Marshall stated the doctrine which, fifteen years later, he was to announce from the Supreme Bench:

> 'If,' he continued, 'they (Congress) were to make a law not warranted by any of the powers enumerated, it would be considered by the (National) judges as an infringement of the Constitution which they are to guard. They would not consider such a law as coming under their jurisdiction. *They would declare it void* . . . To what quarter will you look for protection from an infringement of the Constitution, if you will not give the power to the judiciary? There is no other body that can afford such a protection.' "

It is a very striking fact that the duty of the Supreme Court which Marshall announced in *Marbury* v. *Madison* was the subject of debate in the Virginia Convention in 1788 and that Patrick Henry was afraid that federal judges would not have the courage to perform their duty, which he regarded as essential to the protection of the people of Virginia.

The late William G. Sumner, in one of his books, has said:

> "The Nineteenth Century was characterized by the acquisition and use of the critical faculty . . . The critical habit of thought, if usual in a society, will pervade all its mores, because it is a way of taking up the problems of life. Men educated in it cannot be stampeded by stump orators and are never deceived by dithyrambic oratory. They are slow to believe. They can hold things as possible or probable in all degrees, without certainty and without pain. They can wait for evidence and weigh evidence, uninfluenced by the emphasis or confidence with which assertions are made on one side or the other. They can resist appeals to their dearest prejudices and all kinds of cajolery. Education in the critical faculty is the only education of which it can truly be said that it makes good citizens."

If there is one result of American institutions since the Revolutionary War, more valuable to the American people than any other, and a result which marks the great difference between the co-operative individualism of this country

and the consolidated collectivism of which modern Germany has been a sufficient example, it is the education in the critical faculty and its natural effect in the development of the individual character of American citizens.

Americans have generally considered that the strongest force in this education has been the principle of local self-government and the sense of individual responsilibity which results from it. The men who framed the Constitution of the United States and, perhaps still more, the delegates to the various conventions which ratified that instrument realized this and there can be no question that they intended to protect this principle in the federal constitution.

Is Article V an article containing *delegated* powers to congress and to three-fourths of the state legislatures, or not? How can it be anything but a delegation of power?

If the interpretation of these delegated powers is affected by the principle of local self-government as expressed in the other provisions of the instrument, then it should be realized that this principle, if not protected by inherent limitations of the amending power in Article V, may be so gradually undermined by "camouflaged" or ill-considered amendments, which overload the government at Washington with functions, that the principle of local self-government disappears in a huge central bureaucracy composed of federal commissions and administrative officials attempting to govern directly the affairs and conduct of individuals in all the 48 states with all the petty tyranny, etc., which inevitably goes with an infinite number of officials of a distant centre of power. We have a good deal of this sort of thing now. How far is it to go?

In view of the passages above quoted and of the serious study of the problem raised by them in the discussions in current law magazines already referred to, the issue which the state of Rhode Island seeks to present can be better understood.

Mr. Justice Miller in his address on the Supreme Court before the Alumni of the Law Department of Michigan University in 1887, said:

> "The necessity of the great powers conceded by the Constitution originally to the Federal Government and

> the *equal necessity* of the autonomy of the States and their power to regulate their domestic affairs, remain as the great features of our complex government."

(See Miller "Lectures on the Constitution of the United States," p. 412), and again in his address at Philadelphia at the celebration of the one hundredth anniversary of the framing and promulgation of the Constitution, he said:

> "While the pendulum of public opinion has swung with much force away from the extreme point of States' Right doctrine, there may be danger of its reaching an extreme point on the other side. In my opinion, the just and equal observance of the rights of the States and of the General Government, as defined by the present Constitution, is as necessary to the permanent prosperity of our country and to its existence for another century, as it has been for the one whose close we are now celebrating." (See Lectures, p. 24.)

F. W. GRINNELL.

COMMUNICATIONS TO THE EDITOR.

STOCKBROKERS AND THE "WAGERING CONTRACTS ACT" IN MASSACHUSETTS.

INTRODUCTORY STATEMENT.

The following discussion appeared in a pamphlet issued by the Governing Committee of the Boston Stock Exchange for the information of its members. A copy of the pamphlet was sent to the editor of this magazine, and the Publication Committee feels that its contents will interest the bar as it is a carefully prepared discussion which has already been distributed to a good many laymen.

If any members of the bar have comments or suggestions in regard to the subject of the discussion, the editor of the Quarterly will be glad to receive them.

In this connection, in order to avoid any misunderstanding, the statement that has appeared from time to time ever since this magazine was started should, perhaps, be repeated, that:

> "The publication or reprinting of the views of any individual or of material from any other publication in this magazine does not in any way commit either the association or the members of the Publication Committee to the views expressed. Such publications simply mean that in the opinion of the committee the views expressed are likely to be found useful or suggestive and are sufficiently concise and well-written expressions of considered professional opinion on appropriate subjects, to merit publication." (See "Outline for the Development of the Quarterly," Mass. Law Quart., Vol. I, No. 2, p. 3.)
>
> PUBLICATION COMMITTEE.

The pamphlet contains the following statement:

> The following summary of decisions under the Statute known as the "Wagering Contracts Act," together with the present state of the Act, has been prepared by a well-known lawyer much interested in the matter and, al-

though not prepared for the Boston Stock Exchange, it is now, by reason of its importance, and with the author's consent, published by the Governing Committee for the information of its members.

GEORGE A. RICH,
Secretary.

STOCKBROKERS AND THE "WAGERING CONTRACTS ACT."

An act has been lately passed by the Massachusetts Legislature intended to mitigate some of the hardships that have been imposed on stockbrokers by means of the statute known as the "Wagering Contracts Act," which is contained in the Revised Laws, c. 99, ss. 4-7. The new act, which is c. 247 of the acts of the present year and goes into effect on September 18, 1919, amends the two principal sections of the present act by adding the provisions set out below in brackets, so that the sections read as follows:

Section 4. Whoever upon credit or upon margin contracts to buy or sell, or employs another to buy or sell for his account, any securities or commodities, intending at the time that there shall be no actual purchase or sale, may sue for and recover in an action of contract from the other party to the contract, or from the person so employed, any payment made, or the value of anything delivered, on account thereof, if such other party to the contract or person so employed had reasonable cause to believe that said intention existed; *but* no person shall have a right of action under the provisions of this section if, for his account, such other party to the contract or the person so employed makes, in accordance with the terms of the contract or employment, personally or by agent, an actual purchase or sale of said securities or commodities, *or a valid contract therefor.* [If a purchase or sale of the securities or commodities ordered to be bought or sold is made by the person so employed on a stock exchange or board of trade, and other purchases or sales of such securities or commodities are made on the same day on such exchange or board by such person for others in due course of business, and the balance of such purchases or sales of securities or commodities is received

or delivered by such person by direction of the clearing house of such exchange or board on the day when such purchase or sale or contract therefor is made, or on the regular clearing day of such exchange or board next thereafter, which clearing day shall in no event be more than four days after such purchase or sale, or contract therefor, is made, such purchases and sales shall be deemed actual purchases and sales within the meaning of this section.]

Section 6. In a proceeding under the provisions of the two preceding sections, [if the person so employed does not make an actual transaction relieving him from liability under the provisions of section four,] the fact that the seller or the person employing another to sell for his account did not own the securities or commodities at the time of the contract of sale or at the time of the giving of the order to sell, and the fact that settlements were made without the completion of the purchase or sale of the securities and commodities bought or sold or ordered to be bought or sold, shall each be prima facie evidence that within the meaning of section four there was an intention that there should be no actual purchase or sale, and that there was reasonable cause to believe that said intention existed; and the parties liable to an action under the provisions of said section shall be jointly and severally liable.

Origin of the Statute.

It is important that it should be understood how the law on this subject reached its present state in Massachusetts and how it has been brought to bear so oppressively upon stockbrokers. The statute originated in an act of 1890, c. 437, "relative to wagering contracts in securities and commodities," which was promoted by the stockbrokers themselves for the purpose of suppressing "bucket shops." A petition in support of the legislation was signed by M. R. Ballou, who was then chairman of the Boston Stock Exchange, Lyman B. Greenleaf, Francis A. Davis, and fifty-four other bankers and brokers (House Journal, p. 399). The bill (House No. 528) was passed as it was reported by the Judiciary Committee without any substantial change.

The act differed from the present statute, in the sections

corresponding to those above set out, in providing that a person contracting to buy or sell, or employing another to buy or sell, might sue and recover any payment or the value of anything delivered, if he had at the time "*no intention* to perform the same by the actual receipt and delivery of the securities or commodities," and there was no provision that he should not have a right of action if the other party or the person employed made an actual purchase or sale or a valid contract therefor. There was also a provision that the fact that the seller, or the person employing another to sell, did not own the securities or commodities at the time, and the fact that settlements had been made without actual delivery and receipt of them, should each be prima facie evidence that no such intention existed.

This act had little effect in the way of suppressing bucket shops, but it was turned with great success against the brokers themselves. An attempt was even made in *Rice* v. *Winslow*, 180 Mass. 500, to hold a broker liable to a customer, who had employed him to buy securities, intending that he should do so and carry them for him with a margin of security against loss, and that they should afterwards be sold in pursuance of the customer's orders. It was contended that the contract between them was one of sale, by which the broker agreed to buy the shares and ultimately to sell them to the customer, and, as the customer did not intend to receive the securities from the broker and pay for them, the transaction was within the act. But this contention entirely failed, and it was held that the customer did not contract to buy from the broker at all, but only employed him as an agent to buy for him, and, if he intended that the broker should do so, the transaction was not a wagering contract and was not within either clause of the statute.

Amendments of 1901.

It had become evident however that the act invited fraudulent claims by dishonest customers, who would pretend, if their speculations were unsuccessful, that they had no intention that the broker should buy or sell in accordance with the orders that they had given. They would affect an ignorance of the meaning of their orders or what the course of business was, and would say that they only intended to speculate and had

no intention at all as to the manner of doing it. Such frauds were facilitated by the artificial evidence provided by the statute in cases of "short sales," where the fact that the customer did not own the securities when he gave the order to sell them was made prima facie evidence that he had no intention actually to deliver them and that the broker had reason to believe that no such intention existed. This fact was not really any ground for imagining the absence of such intention, independently of the effect arbitrarily given to it by the statute, for an order to sell when the customer "sells short," is ordinarily executed in the same manner as any other order to sell, and, if the customer does not provide the securities to be delivered, the broker provides them in the way explained by the court in *Chandler* v. *Prince*, 221 Mass. 495, 502. The court itself in *Parkhurst* v. *Almy*, 222 Mass. 27, 31-32, directed a similar transaction for the purpose of enforcing a judgment, by "selling short" shares belonging to the judgment debtor which were not in its possession or control, and borrowing other like shares to be hypothecated for the protection of the corporation against liability for issuing new certificates. But the statute nevertheless says that ordering a "short sale" shall be prima facie evidence that the person giving the order does not intend to sell, although this is contrary to the fact unless there is also an understanding to that effect between the parties.

For the purpose of relieving stockbrokers from some of these oppressive provisions of the statute, it was amended by the act of 1901, c. 459, which changed the two sections into their present form, without the additions made in the present year as already mentioned. The amendment was made upon the petition of Kidder, Peabody & Co. and others with a bill accompanying their petition (House No. 736). The bill proposed to change the provision that a person contracting to buy or sell, or employing another to do so, might recover if he had *no intention* to perform the contract, by substituting for it a provision that a person so contracting, or employing another "having at the time *the intention* that the contract *is not* to be performed," by the receipt or delivery, etc., might recover if the other party, or the person employed, had reason to believe that such intention existed. It also provided that there should

be no right to recover if the person so employed had "*performed* the contract of purchase or sale by the receipt or delivery of the securities or commodities." This last provision was a recognition of the fact that the customer's *intention* that the contract should not be performed, and the *reason to believe* that such intention existed, although established by legal evidence, might really have no existence in fact, for otherwise it can hardly be imagined that the legislature would provide that an agent might exonerate himself from liability by doing what he had reason to believe that his employer intended that he should not do. The bill however retained the provision for the fictitious evidence, that an order for a sale by a person not owning the securities or commodities at the time should be prima facie evidence of his intention that the contract should not be performed and of the other party's reason to believe that it existed, the language being changed only to correspond with the change in the previous section.

While this bill was under consideration by the judiciary committee, it was suggested by the counsel for certain brokers that the provision above mentioned, regarding performance by receipt or delivery of the securities, would not give the intended protection to brokers who bought and sold securities upon the stock exchange, because their purchases and sales of each kind of securities during the day were by the rules of the stock exchange set off against one another and only the balance, if there was any, was received or delivered. It was obvious that a contract of purchase or sale was never performed by a receipt or delivery of the securities, where the contract was set off against another contract, and nothing, or only a part of the subject of the contract, was received or delivered. Therefore it was suggested that, as the object of the statute was only to prevent "wagering contracts" and to ensure actual transactions, a valid contract for a purchase or sale ought to protect a broker against an action as effectually as a purchase or sale completed by receipt or delivery of the securities, and that a provision to that effect should be included in the bill. This suggestion was adopted by the committee, and the bill was redrawn with a provision, in the terms of the present statute, that there should be no right of action if the other party to the contract, or the person employed to

buy or sell, "makes in accordance with the terms of the contract or employment, personally or by agent, an actual purchase or sale of said securities or commodities, *or a valid contract therefor.*" The bill as so drawn was reported to the House of Representatives (House No. 1212) and was afterwards passed (1901, c. 459; Rev. Laws, c. 99, ss. 4, 6). The amendment of the act so as to improve the position of the brokers was opposed by the representatives of the "bucket shops," for they would derive no benefit from the amendments and they wished the act to operate with as much severity as possible against their enemies, the brokers.

The Customer's Intention.

After the passage of this amending act it was held in 1904 in *Wilson* v. *Head*, 184 Mass. 515, 517, that a recovery could be had against a broker, only when the customer had an affirmative intention "that there shall be no actual purchase or sale," while the former statute allowed such a recovery, not only when there was such an affirmative intention, but also when there was a mere negative state of mind in regard to the subject.

Contracts for Purchase or Sale.

Subsequently the question arose in *Fiske* v. *Doucette*, 206 Mass. 275, whether a broker made out a defence by showing purchases and sales made upon the New York and Boston stock exchanges. The purchases and sales appear to have been made in the usual way and cleared according to the ordinary practice by setting them off against other purchases and sales of the same broker and delivering or receiving the balance. It was held that this was insufficient to establish a defence. It is said in the opinion of the court (p. 280),

> "Whether *valid contracts* for such securities were made is not raised by the defendant's exception. The defence was not and could not well have been based upon this ground, the claim being that according to the practice of the stock exchanges *actual sales and purchases* were shown. There was nothing in the case to indicate contracts for *future deliveries*. The dealings were all on the footing of *present deliveries*."

As the question whether *valid contracts* were made was not raised, it is probable that less attention was given to the question than otherwise would have been the case, and it was not observed that the statute says nothing about future deliveries and speaks only of "an actual purchase or sale of said securities or commodities, or a valid contract therefor." The remarks were only obiter dicta and had no effect in the decision of the case against the defendant.

But afterwards in the case of *Adams* v. *Dick*, 226 Mass. 46, the point was directly raised. The purchases and sales were made upon the New York stock exchange and the terms were entered on tickets signed by the brokers and showing the delivery date, which was always the day following, or the following Monday when the transaction was on a Friday or Saturday (p. 54). But it was decided that the brokers could not maintain a defence on the ground that they had made valid contracts for the purchase and sale of the securities, and the views expressed in the dicta in the previous case were again asserted and amplified as follows (pp. 55-56):

> "The course of business of the stock exchange shown in this case is in every essential *a present sale* of stocks and not a contract *for a future delivery* within the meaning of the statute. The delay in the physical transfer of the possession for a day is for *mutual accommodation* growing out of the nature of the property to be delivered and the possible necessity for the issuance of new certificates in order to complete the sale. But it is none the less a present sale because of this delay in the delivery. The dealings were all on the *footing of present deliveries.* . . . The words 'a valid contract therefor' in the clause of R. L. c. 99 s. 4, which provides that there shall be no recovery where the broker or other party makes 'an actual purchase or sale of said securities or commodities, or a valid contract therefor' *refer to contracts for future deliveries* and not for present sales such as were conducted on the stock exchange in the case at bar. The statute applies, also, to commodities, which include provisions and grain, which are dealt in by contracts for future delivery, and which afford *ample scope* for the operation of the statute on contracts for future deliveries."

Although it is asserted that the words "a valid contract therefor" refer to contracts for future deliveries, no attempt is made to justify this restriction of the language by anything contained in the statute. The natural meaning of the words is not restrained by anything in this or any other part of the statute. The clause immediately preceding is "an actual purchase or sale of said securities or commodities," and "a valid contract therefor" plainly means a valid contract for the purchase or sale of the securities or comodities. There is no qualification except that the contract must be made in accordance with the terms of the employment of the person employed to buy or sell, and this qualification applies equally to "an actual purchase or sale." There is no rule of law that authorizes the court to limit the plain meaning of the statute by construction, so that it shall only have the effect that it would have had if the words had been "or a valid contract therefor *for future delivery.*"

As regards the statement that the statute applies also to commodities, including provisions and grain, "which are dealt in by contracts for future delivery, and which afford ample scope for the operation of the statute on contracts for future deliveries," it should be observed that the statute applies also to *securities*, which are defined by s. 7 as including shares, bonds, coupons, and other evidences of debt, and scope is not afforded for the operation of the statute if such contracts as are usually made for their purchase or sale are excluded from its operation. It seems to have been thought that the provision had sufficient scope if something could be found to which it might apply without including stockbrokers in its protection. No reason is suggested for putting such a strain on the language of the statute.

It is also difficult to follow the reasoning by which the conclusion is reached that the purchases and sales made by the defendants upon the stock exchange were not contracts for future deliveries. These purchases and sales, like other stock exchange contracts, were expressly made for delivery on the following or a subsequent day, as above mentioned. In the ordinary use of language, the following day is considered as future, but it is said in the opinion of the court that the contracts were not for "a future delivery *within the meaning of*

the statute," because the dealings were "on the footing of present deliveries," and the delay in the physical transfer was for mutual accommodation and the possible necessity for the issue of new certificates. It is hard to determine "the meaning of the statute" as to a future delivery, when the statute does not mention future delivery at all. But it is certainly a mistake to say that the contracts were made "*on the footing of present deliveries,*" for it is expressed in them that the deliveries were to be made on the following day, and a present delivery could not have been required nor a present payment called for. It is also a novelty to hear it said that tomorrow is not future, when it is agreed upon for the mutual convenience of the parties or for any other reason. In suggesting that the reason may have been the possible necessity for a new certificate to complete the sale, it must also have been supposed that the selling broker was bound to get a new certificate for the purchaser, and that he would do this before the time for the transfer, and before he knew who the broker was to whom the delivery was to be made, or into what name the transfer was to be made, or whether he himself was to make any delivery at all or was on the contrary to receive a transfer of shares from some other broker. It is evident however that this suggestion was not applicable to bonds or securities payable to bearer, which pass by delivery.

On the grounds above stated stockbrokers have been excluded from the benefit of this provision, which was put into the statute especially for their protection in executing the orders of their customers upon the stock exchange, and, so far as they are concerned, the provision is eliminated from the statute as effectually as if it had been provided that it should not apply to the transactions of stockbrokers.

Taint of One Transaction.

Another point was involved in *Fiske* v. *Doucette*, 206 Mass. 275, 285. It appeared that in a number of instances the purchases made by the broker were actually completed and he had in his control certificates for the shares purchased. But the court held that the broker was liable for the whole amount claimed as if all the transactions had been contrary to the statute, and gives the following reasons (p. 285),

> "Although there was evidence that in a number of transactions the defendant did have in his control certificates for the stock purchased for the plaintiff's account, yet as to many there either was no such evidence or there was definite evidence that he did not have them. The *whole series of dealings* based upon the bonds deposited with the defendant was thus *tainted* with illegality and the plaintiff is entitled to recover. *Way* v. *Greer,* 196 Mass. 237, 245. *Kennedy* v. *Welch,* 196 Mass. 592, 595. *Embrey* v. *Jemison,* 131 U. S. 336."

The proposition that a series of dealings is tainted with an illegality in one or a part of them is not supported by anything in the cases cited. They only go to the point that a contract is void if the consideration for that particular transaction is illegal in whole or in part. There seems to have been no previous authority for the proposition that the illegality of one transaction taints any other dealings between the parties. On the contrary the law seems to have been clearly the other way. If a grocer's account contains charges for intoxicating liquors sold in violation of law, the illegality does not taint the other dealings included in the same account. This is shown by the decision in *Warren* v. *Chapman,* 105 Mass. 87, 89, where a promissory note for $500 was given to be applied to the maker's account with the plaintiff's firm. The account contained items for intoxicating liquor illegally sold, but the charges for goods lawfully sold exceeded $500. The court held the note to be perfectly good, saying, "When the note was given, the law applied it to the items of the account lawfully sold." The same principle was applied in *Bondy* v. *Hardina,* 216 Mass. 44, 48, where there was a series of dealings in intoxicating liquors, one of which was illegal and the others were not. According to what is laid down in *Fiske* v. *Doucette,* a stockbroker does not stand in as good a position before the law as a grocer who makes illegal sales of intoxicating liquor, and an illegality in one of his transactions taints all his other dealings with the same person. The only limit to the taint that has yet been established is that it does not extend to transactions included in an account that was balanced or "squared up" more than six years before the action (*Houghton* v. *Keveney,* 230 Mass. 49, 53).

THE CUSTOMER'S INTENTION AGAIN.

It also seems as if the statutory requirement that a customer, in order to sustain an action, must have an intention that there shall be no actual purchase or sale, had almost faded into a shadow. An order to sell given by a person who does not own the securities is made by the statute prima facie evidence that he intends that the sale shall not be made. This however is only evidence and does not establish the fact, if there is any other evidence of his intention. If the customer himself is a witness and admits that he did not have any intention at all, no reasonable person would believe, by reason of the prima facie evidence, that he did have an intention that there should be no sale. This is not a question of law, but of common sense, and the judge or jury that determine the facts must decide between the prima facie evidence created by the statute and the actual admission of the person himself. If they find the fact to be that he did not have any intention, that is the end of the prima facie evidence. It cannot properly be used to impose on him an intention that he did not have. Yet that is very nearly what was done in *Adams* v. *Dick*, 226 Mass. 46, 52. The auditor, upon whose findings of fact the case was heard, found as to the plaintiff's intention as follows (record, pp. 17-18),

> "He had no intention as to whether or not defendants in carrying out his orders to buy or sell should actually receive or deliver from or to anyone else certificates of stocks ordered by him to be bought or sold, and defendants did not believe and had no reason or ground to believe that any such intention existed."

Notwithstanding this special finding of fact, he found generally in conclusion (p. 20), among other things, that the "plaintiff intended that there should be no actual purchase or sale, and defendants knew and believed that said intention existed," and the court held that this general conclusion was not inconsistent with the special finding. This is explained in the opinion of the Court as follows (p. 52),

> "This is not inconsistent with the express finding that the plaintiff had no intention as to the point whether the

> defendants, in carrying out his orders to buy or sell, should actually receive from or deliver to any one else certificates of stock ordered by him to be bought or sold. This is not a finding that there was a negative lack of intention by the plaintiff upon the vital point that there should be '*no actual purchase or sale*' on his orders. It relates to the different subject of *delivery and receipt of certificates*. His mind might be a blank upon that matter and still the positive intention that there should be no actual purchases or sales on his orders arise from the prima facie case to that effect made out by the *short sales* and from all the other circumstances in the case tending to that conclusion."

As shares are usually transferred by delivery of the certificates with the proper assignment and cannot be effectually transferred without delivery of the certificates (as shown in *Parkhurst* v. *Almy*, 222 Mass. 27, 29), it might reasonably have been understood that the receipt or delivery of the certificates was referred to as meaning the same thing as an actual purchase or sale of the shares. Similar expressions were used with that meaning by the same judge in *Fiske* v. *Doucette*, 206 Mass. at pp. 280, 281, 282, 283, 284, in determining whether there had been actual purchases or not, and it is strange if the meaning was not the same in *Adams* v. *Dick*. But the prima facie evidence created by the statute out of the "short sales" was sufficient to overcome the effect of the finding and to force upon the plaintiff a positive intention which he could not be induced to say himself that he had. There is also in the opinion a reference to "all the other circumstances in the case tending to that conclusion," but no such circumstances are mentioned and an examination of the record upon which the case was heard does not disclose any.

This is added however (p. 52),

> "It was expressly found that the plaintiff 'intended not to receive nor to deliver *himself* any of the stocks ordered by him to be bought or sold by the defendants, and the defendants knew he so intended,' although this is not conclusive."

This sounds like an echo of the contention that was made by the plaintiff in *Rice* v. *Winslow*, 180 Mass. 500, 502, and rejected by the court. The court there held that it was "entirely immaterial" whether the customer intended to have the broker hold the securities for him until they should be sold in pursuance of his orders and then to receive the balance or pay the loss, or whether he intended ultimately to pay the balance of the purchase money and receive the securities from the broker, and that the arrangement did not make the transaction a wagering transaction. It does not seem sufficient to say in *Adams* v. *Dick* that the finding "is not conclusive," but it should have been said, in accordance with *Rice* v. *Winslow*, that it was "entirely immaterial" and was not entitled to any consideration.

Repayments to the Customer.

There was also another question in *Adams* v. *Dick*, and it is not easy to understand the manner in which it was disposed of. The case came before the court upon a report of the judge, which was accompanied by the auditor's report and set out the questions reserved for the court and the manner in which the case was to be dealt with according to the decision of the questions. A copy of the plaintiff's account with the defendants, taken from their books, was annexed to the report (record, p. 11, B), which stated that there was no dispute as to the items (p. 4), and the auditor (p. 18), as well as the judge (p. 20), had found the account to be a true record of all the transactions. The judge reserved in his report (p. 8) the following question, among others, for the court, viz.

> "If I ruled correctly in all other respects, but if the defendants are entitled to have the amount which is recoverable by the plaintiff reduced to any extent on account of payments made by them to him from time to time, as found by the auditor, and as appears from the statement of the account above referred to, such order is to be made, either for a new trial or for judgment in a stated amount, as may seem proper to the court."

These matters and the question reserved upon them are not mentioned in the report of the case in 226 Mass. 46, or al-

luded to in the opinion of the court, but they appear in the printed record of the case, which is bound up with the briefs in the collection in the Law Library at Boston, and any one can see them there. At the trial the judge had been requested by the defendant to make certain rulings and findings (226 Mass. 48-49), which he refused. One of them, numbered 11, was, that the plaintiff had paid the defendants from time to time on account of the transactions sums amounting in the aggregate to $23,031.50 and that the defendants had repaid to him from time to time on that account sums aggregating $17,-486.38, and that the action could be maintained only for the balance $5,545.12, with proper interest. This request seems not to have been urged in the Supreme Court and no reference to it is made in the defendants' brief (p. 19), by which the defendants' case appears to have been rested entirely upon the provision of the judge's report above mentioned. But the court, not regarding that provision or the account or the argument upon them disposed of the matter as follows (226 Mass. p. 57),

> "The eleventh request was denied. The request involved a finding of fact as well as a ruling of law. The finding of fact was not made. This cannot be said to have been erroneous in law. If the repayments were not in fact on account of the principal sums paid in, but on account of the unlawful transactions, then the defendants were not entitled under the statute to be credited with them. Sufficient facts were not found which required the ruling as matter of law that the payments made should be credited to the defendants. This aspect of the case is covered by *Lyons* v. *Coe,* 177 Mass. 382, 384; *Anderson* v. *Metropolitan Stock Exchange,* 191 Mass. 117, 122, 123; *Picard* v. *Beers,* 195 Mass. 419, 429; *Beers* v. *Wardwell,* 198 Mass. 236."

It was then said that, there being no error in the rulings made or those denied, judgment should be entered for the plaintiff "in accordance with the terms of the report" for $23,031.50 with interest from the commencement of the action. But the terms of the report did not authorize such a judgment without disposing of the question whether the amount was

reducible to any extent on account of the payments made to the plaintiff. That question is not alluded to by the court and the remarks above quoted are inapplicable to it. The 11th request, which alone was dealt with, was in fact rendered entirely immaterial by the provision regarding the question reserved, which required that, if the amount was reducible to any extent on account of the repayments as appeared by the account, although not to the whole extent of $17,486.38 as claimed, an order should be made either for a new trial or for judgment for the proper amount. It could not be said that sufficient facts were not found to establish that repayments were in fact made on account of the principal sums paid in and not on account of the "unlawful transactions." Those facts appear in the account, which was found to be correct, both by the auditor (record, p. 18) and the judge (p. 20) and the agreement of the parties (p. 4).

In the account (p. 11) the first repayment was on Sept. 24, $3500. At that time the only moneys standing to the plaintiff's credit were moneys that had been paid in by him as follows, Aug. 3, $2500, Aug. 19, $800, Sept. 23, $4831.50 (part of $34,831.50 proceeds of sale of shares, upon which $30,000 had been advanced to pay the State Street Trust Co. on the plaintiff's account, as explained and found by the auditor, p. 15, and in accordance with the plaintiff's claim, p. 13). There were no other moneys and no other transactions on account of which that sum of $3500 could have been paid to the plaintiff. The defendants were accordingly entitled to have the amount recoverable reduced by $3500, even if there were no other payments that ought also to be deducted. According to the terms of the report, the court was not at liberty in these circumstances to enter judgment for the whole amount without any reduction, but was bound either to order a new trial or to ascertain the proper amount and enter judgment for the amount ascertained.

The court might well have hesitated to go into all the particulars of the account in order to ascertain whether each transaction resulted in a profit or a loss and out of what moneys each payment to the plaintiff was made. But the terms of the report did not authorize the court to give judgment for the whole amount without going into the account far enough to determine whether the plaintiff was entitled to have the

amount reduced to any extent or not. When that fact was ascertained the case might have been remitted to the court below to ascertain the exact amount of all the proper reductions. The account distinctly shows that the first repayment of $3500 was made out of moneys paid in by the plaintiff. It also shows that the subsequent repayments could not have been made without resorting to the moneys from time to time paid in by the plaintiff. It also shows that all his profits from such of the transactions as resulted in any profit amounted to only $3,055.25, and, if these had been paid to him at the time without regard to his previous losses, which far exceeded them, he still would have received $14,431.13, which could not have been paid on account of anything except the money that he had paid in.

But besides this, the fact was found that none of the repayments were made "on account of the unlawful transactions," the possibility of which is suggested by the court in disposing of the 11th ruling requested in the court below (226 Mass. p. 57). The auditor found that "During the period . . . defendants paid to plaintiff in various amounts *not related to particular transactions* the total sum of $17,486.38" (record, p. 18), and this finding was confirmed by the judge (p. 20). As the payments did not relate to particular transactions, they were not made on account of the unlawful transactions, and the rules of law required the application of the repayments to the lawful demands. This is shown by *Bondy* v. *Hardina,* 216 Mass. 44, 48, where one of the items in an account was an illegal sale of intoxicating liquor, and the court held that the creditor receiving money paid towards the account generally without any specific appropriation could not apply it to the illegal item and sue for the others, but "the law will apply these payments to the lawful demands." The circumstances were the same in this case. The only demands that the plaintiff had against the defendants, other than those held to be unlawful, were on account of the principal sums paid in, and by law the repayments were applicable only to those demands. The case of *Lyons* v. *Coe,* 177 Mass. 382, and other cases of its class, where the payments were made and received as the sums due upon closing illegal contracts, are irrelevant to the matter. Accordingly the fact was found that repayments to the amount specified were made

in a manner that required their application to the principal sums paid in. This is the only fact involved in the 11th request, and the ruling of law necessarily followed, that the action could be maintained only for the balance, $5,545.12. It would seem therefore that the court ought to have decided that this particular ruling should have been made, and that judgment should be entered for that sum in accordance with the terms of the report, which provided that judgment should be entered for $5,545.12, if the ruling ought to have been made (record, p. 8).

The result of the whole matter is that the defendants were obliged, not only to reimburse the plaintiff the amount of his losses, $5,545.12, but also to pay him a second time $17,486.38 with interest for over six years. This profit to the plaintiff from the enterprise was certainly much more than he could have expected if his speculations had been successful.

How the court came to dispose of the case so summarily and give judgment against the defendants for the whole amount, without any reference to the account, or to the provision in the report for reducing the amount, and without any regard to the fact that the repayments had been made in a manner that did not permit the application of any part of them to unlawful transactions, is incomprehensible. But it is plain on the face of the record that a great wrong was done to the defendants.

The Present Situation.

The statute of 1919, c. 247, in the amendments above set out, provides that if a broker receives or delivers the balance of his purchases or sales on the stock exchange by the direction of the clearing house as mentioned, the purchases and sales shall be deemed actual purchases and sales within the meaning of s. 4 of the amended act. This gives him a new defence, which does not seem capable of being nullified by the method applied to the provision that there shall be no right of action against him where he has made a valid contract for the purchase or sale of the securities. The fictitious evidence provided by the statute in favor of the customer in cases of "short sales" is also limited to cases where the broker does not make an actual transaction under the provisions of s. 4. This seems to make such evidence unavailable to establish the intention on the part

of the customer, until it has been first established that the broker did not make an actual purchase or sale, either by receipt or delivery of the balance directed by the clearing house or otherwise, or by a valid contract therefor. But, if in a single instance of a "short sale" the broker fails to receive or deliver the clearing house balance, or otherwise to show an actual transaction, that lets in the fictitious evidence of intention. The difficulty of overcoming that evidence, even by the admission of the customer himself that he had no such intention, has already been shown. If this prima facie evidence is not overcome, the transaction will be considered illegal, and, that being illegal, all the other transactions with the same customer will go down like a row of bricks. The "taint" of one illegal transaction, which in the case of an illegal seller of intoxicating liquor does not affect his other transactions, prevents a stockbroker from afterwards making any valid purchases or sales for the same customer and spoils all those previously made, although they were originally not open to any question. If he makes any payments to the customer without directions as to the manner in which they are to be applied, it will be assumed that they may have been made on account of the illegal transactions, unless the contrary is affirmatively proved, and they will be disregarded in computing the amount that the customer is entitled to recover.

There is no justice or morality in a statute that provides for or permits such things, and there is no reason why it should be allowed to continue in force. The evil aimed at by the statute was the making of "*wagering contracts,*" as expressed in its original title and explained in *Rice* v. *Winslow,* 180 Mass. at p. 501. It was intended by this means to suppress "bucket shops," which were places where a business of betting on the rise and fall of the values of securities was carried on in the form of orders or contracts to buy or sell with the understanding of both parties that there was to be no purchase or sale at all and that the loss or gain should depend on the market values. It was popularly called the "bucket shop act," but was a failure so far as the suppression of those establishments was concerned, and it was found necessary to make entirely different provisions for that purpose by the act of 1907, c. 414, by which the species of contract aimed at was

defined and made a criminal offence. But the Wagering Contracts Act (1890, c. 437; R. L. c. 99, ss. 4-7) does not mention wagering except in the title, and goes entirely outside of wagering contracts in its provisions, which would not touch stockbrokers engaged in regular transactions unless it did so. The provision, that whoever employs another (e. g. a broker) to buy or sell on his account, intending at the time that there shall be no actual purchase or sale, may recover from him any payment made on account thereof, if he had reasonable cause to believe that the intention existed, is not limited to wagering contracts by its language and has not been so limited by construction. The authors of the act evidently had wagering contracts in mind, but they must have had a very indefinite idea how the wagering entered into this provision. A broker, receiving an order to buy for a customer with knowledge that the customer intended that there be no purchase, would not be justified in buying for him, and if he did, he would not be able to make the customer responsible for the price, but there would certainly not be any wagering contract, unless there was also an agreement or an understanding between them that the transaction should be settled according to the rise or fall in the market prices, or in some similar way, the broker losing in one case and the customer in the other. If the act had been limited to wagering contracts, there would have been no more color for its application to such cases as *Fiske* v. *Doucette,* 206 Mass. 275, *Adams* v. *Dick,* 226 Mass. 46, and *Houghton* v. *Keveney,* 230 Mass. 49, which are mentioned above, than there was for its application to *Rice* v. *Winslow,* 180 Mass. 500.

The idea of the wagering contract has thus disappeared from the provisions of the act. But the act also facilitates the proof of the case of the customer by the provision that an order to sell shall be prima facie evidence of an intention that there shall be no sale and of the reason to believe in the existence of the intention, if the customer does not own the securities at the time. This is purely fictitious evidence and is contrary to the natural inference, which is that the customer intends that the broker shall sell and obtain the securities for delivery in the usual way, as explained by the court in *Chandler* v. *Prince,* 221 Mass. at p. 502. There is no doubt that this is what the customer intends, and the opposite inten-

tion is imputed to him by the statute contrary to the truth. It is as unreasonable to do this as it would be to provide that an order to buy, when the customer does not furnish the money, shall be evidence that he has an intention that there shall be no purchase.

There is no reason why persons should be encouraged to engage in stock speculation by provisions of law that enable them to throw their losses on the brokers employed by them, when the speculations are unsuccessful, while they are allowed to keep all their gains themselves. It is wrong to provide them with evidence to assist them in establishing a case that is contrary to the truth, and with inducements to speculate by means of "short sales," which will furnish evidence of a "taint" that will extend to other transactions. There is no such legislation in New York or England, where the number of transactions is infinitely larger, and there is no occasion for it here.

MORE ABOUT TENANCY BY THE ENTIRETY OR "ENTIRETIES."

The correspondence on this subject, published in the August number of this magazine, appears to have attracted a good deal of interest among members of the bar having to do with real estate. Accordingly, the following correspondence is here reprinted for the information of those interested.

Editor, Massachusetts Law Quarterly:

Lord Coke says, "If a man make a feoffment in fee to the use of himself and of such wife as he should afterwards marry, for term of their lives, and after he taketh wife, they are joint tenants, and yet they come to their estates at several times." Co. Lit. 188a. This statement has been constantly quoted with approval, as in *Sammes's Case*, 13 Co. Rep. 54, 56; *Sussex* v. *Temple*, 1 Raym. 310, and many other cases and authorities. It supports, on two points, the validity of a conveyance by a husband to his wife and himself under the Statute of 1918, chapter 93.

(1) It shows that Lord Coke considered a tenancy in entirety as a joint tenancy.

Mr. Challis, in his treatise on Real Property, third edition, page 376, note, observes:

> "Lord Coke does not use the phrase 'by entireties.' He speaks of cases in which 'the husband and wife shall have no moieties.' That is to say, he regards tenancy by entireties as being a species of joint tenancy, with the distinguishing characteristic that it confers no power of severance."

This passage from Challis is quoted by Prof. Gray, 1 Cases on Property, 2nd ed., page 344, note.

The same statement is true of many seventeenth century cases, and of Bacon's Abridgment (18th century)—"Joint Tenants," B and D; although the phrase "by the entireties" was in use at least as early as 1690 (see *Back* v. *Andrew*, 2 Vern. 120).

The text-books differ in their classification. Challis, a very precise writer, follows Coke. Leonard Jones supports the view of your correspondent who denies the validity of the conveyance, in a passage quoted by the latter, and taken for the most part by the text writer from a Virginia and a New York case. Jones, Real Property, sections 1790, 1791. Tiffany, on the other hand, says in section 165:

> "A tenancy by entireties (or by the entirety) is essentially a joint tenancy modified by the theory of the common law that the husband and wife are one person,"

citing *Pray* v. *Stebbins,* 141 Mass. 219; *Morris* v. *McCarty,* 158 Mass. 11.

The question is not about the substance of the law before the statute in question, nor what would be the most scientific classification, but as to the usage of the terms "joint tenants" or "jointly" in Massachusetts.

In the first Massachusetts case in point, Chief Justice Parsons, while distinguishing a tenancy by the entirety from other joint tenancies, calls it "a joint tenancy of this nature," *Shaw* v. *Hearsey,* 5 Mass. 521; and the head note says that a conveyance to husband and wife "creates a joint tenancy." In *Fox* v. *Fletcher,* 8 Mass. 274, and *Varnum* v. *Abbott,* 12 Mass. 474, husband and wife are merely called joint tenants. Whatever the distinctions taken for particular purposes, the courts have continued this general use of the term "joint tenancy" to include tenancy by the entirety. Besides other cases cited by your correspondents, the court in *Hoag* v. *Hoag,* 213 Mass. 50, 53, immediately after drawing a distinction between tenancy by the entirety and joint tenancy, says: "In this Commonwealth the former estate has been described as a species of the latter."

Revised Laws, chapter 134, section 6, provides that "a conveyance to two or more persons or to husband and wife shall create an estate in common and not in joint tenancy," etc. The Legislature apparently here regarded tenancy by the entirety as included in the term joint tenancy.

It should be observed that it is not necessary for the present purpose to hold that tenants by the entirety are joint tenants but only that they hold jointly,—though the distinction is

narrow. To say that they do not hold jointly, merely because they have not the right of severance (which is the only real difference between them and joint tenants) is an extreme technicality, founded apparently on the fiction that two persons are one person.

(2) The passage from Coke shows that the common law rule that "in a conveyance to joint tenants the estate must vest in the grantees at the same instant of time," which your correspondent seems to think has a bearing, is not applicable to conveyances under the Statute of 1918.

It is doubtful whether the estate in joint tenancy does not vest in husband and wife at the same instant, both in the case under consideration, and in Coke's case (notwithstanding the latter's concluding clause); for in both cases the two joint tenants seem to take their joint estates at the same instant, although one of them has previously had a sole estate in the property.

However this may be, the rule has no application to conveyances under the Statutes of Uses, or to devises. Challis, 366; Williams, Real Property, 22nd ed., 139; 2 Jarman on Wills, 6th Eng. ed., 1788; Fearne, Cont. Rem. 312; Tudor, L.C.R.P., 4th ed., 269. It may be abrogated by any statute. Under any theory of the operation of the Statute of 1918, this rule, therefore, need not stand in the way of accomplishing the result intended.

The assertion of your correspondent that the transfer from a husband to his wife and himself under the Statute of 1918, "is not in any sense the conveyance of husband to wife 'as if unmarried' authorized by the act of 1912," is hard to understand. Does he mean to say it is not in any sense "a conveyance"? A transfer by means of the Statute of Uses may be analyzed into two steps, the second of which is effected by the statute itself. Yet we ordinarily speak of the completed transfer as "a conveyance under the Statute of Uses." Even if a transfer under the act of 1918 can be analyzed into two steps, and called "indirect," which does not seem clear, the completed transfer is properly called a conveyance.

It might be argued that the words "as if unmarried" prevent the husband and wife from taking by the entirety because that is an estate that can be taken only by a married couple. But it seems that the utmost effect of this objection

would be, not to defeat the conveyance, but to make them take as simple joint tenants. This is the result of the Married Women's Property Act, 1882, in England. See *Thornley* v. *Thornley*, (1893) 2 Ch. 229, in which case it is also held that under the old law a divorce made them joint tenants. It seems contrary, moreover, to the spirit of the Statute of 1918 to hold that it prevents a wife from taking from her husband any estate which she could take from a stranger.

ROLAND GRAY.

Editor, Massachusetts Law Quarterly:

The discussion in the Law Quarterly in regard to creation of tenants by the entireties by the conveyance from husband to himself and wife has interested me greatly, especially because a question which I have recently been mulling over seems to lie underneath the answer to this question.

Suppose A and B are contemplating matrimony, and a deed runs to them as tenants by the entireties, or as joint tenants. That of course does not create a tenancy by the entirety, as they are not husband and wife. Suppose, however, that they marry, does the joint estate, previously existing between them, become a tenancy by the entirety?

Suppose A and B are husband and wife, and hold real estate as tenants by the entirety, and are divorced. After the divorce becomes absolute are they still tenants by the entirety, joint tenants, or is the divorce in the nature of a conveyance making them tenants in common? In other words, is the relation of husband and wife essential to the continuance of an estate by the entirety, and, in the absence of intention to the contrary, does the relation of husband and wife, between persons previously joint tenants, merge the joint tenancy into a tenancy by the entirety.

I have never seen any decision on this point, and in the discussions it is apparent that the judges do not have the question in their minds in their statement of the principles underlying this form of tenancy.

Very truly yours,

Dear Sir:

As to Mr. ——'s questions I should answer "no" to the first question. See Coke, 187B. I suppose the answer to the second question is that a divorce would make them simply joint tenants. See *Thornley* v. *Thornley,* (1893) 2 Ch. 229.

Editor, Massachusetts Law Quarterly:

Yesterday I stated that in case of a tenancy by the entirety the husband, during the lifetime of both parties, was the one having the right to handle the property and that it was subject to his creditors. Confirming this I call your attention to what Prof. Washburn says, "And during coverture, the husband has the entire control of the estate and the same is liable to be seized by his creditors during his life. But if the husband's creditors levy upon the estate, it survives to the wife on the death of the husband, as if no such levy had been made." 1 Washburn, R. P. 6th ed. page 563. It was held in *Pray* v. *Stebbins,* 141 Mass. 219, that the husband could lease such property and that the lease would be good against the wife during covertures.

Mr. Washburn also answers one question in the negative, for he says on page 562, "If a man and woman, tenants in common, marry, they still continue to hold in common." I apprehend that strictly speaking there is no such thing as survivorship in tenants by the entirety. In the theory of law, they are in such cases, one person and one cannot survive one's self. Such an estate should be considered as a sole tenancy. Mr. Washburn says at page 563, "In such cases, the survivor does not take as a new acquisition but under the original limitation, his estate being simply freed from participation by the other.

"Husband and wife being considered in law as one person, if an estate be conveyed to husband and wife, and to a stranger, the husband and wife will only take one moiety between them, and the stranger will take the other moiety. As there can be no moieties between husband and wife they cannot be joint tenants; therefore, where an estate is conveyed to a man and his wife, and their heirs, it is not a joint tenancy; for joint tenants take by moieties, and are each seized of an undivided moiety of the whole. But husband and wife being but one person, cannot during the coverture, take separate es-

tates; therefore upon a purchase made by them both, each has the entirety, and they are seized per tout, not per my; and the husband cannot forfeit or alien the estate, because the whole of it belongs to his wife as well as to him." 1 Greenleaf's Cruise on R. P. 840.

Very truly yours,

SAMUEL T. HARRIS.

Dear Sir:

I return herewith Mr. Harris' letter to you of December 18th with regard to tenancy by the entirety. I have no opinion on the question of attachment; but think that nothing that he says interferes seriously with my conclusion in regard to deeds under the Statute of 1918. There are doubtless many important differences between a tenancy by the entirety and the ordinary simple joint tenancy, but they do not prevent its being possible and desirable to include tenancies by the entirety under the description of joint tenancy in a general statute from whose operation there is nothing in their peculiar character to exclude them. As to the concluding quotation from Cruise that "husband and wife cannot be joint tenants," there is, at least, some reason to believe that they can take as simple joint tenants and not as tenants by the entirety,—if the intention is made sufficiently plain (see *Hoag* v. *Hoag*, 213 Mass. 50, 53).

Yours very truly,

ROLAND GRAY.

To the Editor of the Massachusetts Law Quarterly:

Referring to two questions under discussion, both are answered in Reeves on Real Property, Sections 688 to 690. The following quotations are pertinent:

> "A conveyance of real property to a husband and his wife makes them owners by the entirety (or by entireties), at common law: and also in most of the United States today, notwithstanding the wide scope of the married women's legislation.
>
> Tenancy by the entirety arises only from a conveyance or devise to a man and a woman, who are husband and wife at the time of such transfer. If they inherit

real property together, they take it ordinarily at joint tenants, or tenants in common. Marriage of a man and a woman, after realty has been conveyed to them, does not make their ownership by the entirety, but leaves it the same as it was originally, ordinarily a tenancy in common."

The following cases are cited in support of the above:

Co. Lit. 187 b.; *Bertles* v. *Nunan*, 92 N.Y. 152; *Messing* v. *Messing*, 64 N.Y. App. Div. 125; *Banzer* v. *Banzer*, 10 N.Y. Misc. 24; *Hardenberg* v. *Hardenberg*, 10 N.J.L. 42; *Holt* v. *Wilson*, 75 Ala. 58. See *Haak Lumber Co.* v. *Crothers*, 146 Mich. 575. Last preceding note but one; *Moody* v. *Moody*, Amb. 649; *Baillie* v. *Treharne*, L.R. 17 Ch. Div. 388; *McDermott* v. *French*, 15 N.J. Eq. 80; *Stuckey* v. *Keefe*, 26 Pa. St. 397; 4 Kent, Com., p. 363.

"As the beginning of this estate must be a transfer to husband and wife, so its continuation depends on the unbroken existence of that relationship. Consequently, an absolute divorce or dissolution of the marriage may cause it to terminate. In many states of this country, such a divorce changes it into a tenancy in common."

Steltz v. *Shewxk*, 128 N.Y. 263; *Harrer* v. *Wallner*, 80 Ill. 197; *Enyeart* v. *Kepler*, 118 Ind. 34; *Hopson* v. *Fowlkes*, 92 Tenn. 697; *Donegan* v. *Donegan*, 103 Ala. 488; *Freeman Coten & Parti.*, Sec. 76."

Yours truly,

W. R. Evans, Jr.

A SUGGESTION FROM A JURYMAN.

To the Editor of the Massachusetts Law Quarterly:

I have just finished five weeks' service on a jury in Boston. I find the work interesting and I am glad to do my share of it, but I happened to be drawn at a time when it was extremely inconvenient for me to serve. I should like, therefore, to call the attention of the legislature and of the Judicature Commission through your columns to a practical suggestion.

When travelling in other parts of the country, I have heard men express surprise that a man was expected to serve for five weeks successively on the jury. In some parts of the country they are drawn for a service of two weeks. In other parts of the country, also, I think in Baltimore, when jurymen are drawn they are asked what time of year is most convenient for them to serve, and then men are drawn so far as is practicable so as to interfere as little as possible with their business.

It is commonly known that men like to avoid jury duty if they can and I believe one reason for this is that they are required to serve for so long a time, often under circumstances when it is extremely inconvenient and when it may cause serious loss to them in their business.

There must be plenty of citizens, subject to jury duty, who would be much more willing to serve if they were called to serve for only two weeks at a time. I understand there is some plan now before the legislature providing that the convenience of jurymen as to the time they shall serve shall be consulted as far as practicable, and I believe that if this were done and the time of service were shortened there would be much more public-spirited feeling on the part of business men and others in regard to jury duty because it would not impose so much of a hardship upon them. It seems to me it is good business for the state to adapt the jury system as far as possible to the convenience of its citizens.

Yours very truly,

A JURYMAN.

MORE ABOUT RATIFICATION OF AMENDMENTS TO THE FEDERAL CONSTITUTION.

The following bill is now pending before the Committee on Federal Relations, on petition of Davis B. Keniston:

HOUSE . . . . . No. 7

AN ACT

To provide for ascertaining the Opinion of the People of the Commonwealth as to the Ratification of Amendments to the Federal Constitution.

Be it enacted, etc.:

Upon the submission by the congress of the United States to the general court of Massachusetts of a proposed amendment to the Federal Constitution, the amendment so proposed shall be referred to the next general court and shall be placed upon the ballot and referred to the people at the polls at the regular state election next ensuing in the manner prescribed by the constitution of the commonwealth and the laws thereof so far as applicable, and the votes upon such amendment shall be received, sorted, counted, declared and transmitted to the secretary of the commonwealth, laid before the governor and council, and by them opened and examined in accordance with the laws relating to votes for state officers so far as they are applicable, and the governor shall thereupon communicate to the general court the total number of votes cast in the affirmative and in the negative for such proposed amendment and likewise said totals arranged by senatorial and representative districts.

Note.

I believe that some action should be taken to secure more deliberate and more thorough consideration in Massachusetts of amendments to the national constitution which may be submitted from time to time by congress. There is a present tendency to deal with these matters on the principle of "Passing the buck" or "Let George do it." It is commonly rumored that one of the recent amendments was submitted by

congress with the expectation and hope on the part of a great many congressmen who voted for it that the state legislatures would not ratify it, and the responsibility was thus thrown on to the shoulders of the state legislatures. When it came before the state legislatures, there is a current rumor that because of political pressure in some states including Massachusetts the state legislature practically threw the responsibility on to the shoulders of the other states and voted to ratify without thorough consideration and before the people of the state had an opportunity to consider the matter.

I see no special objection to House Bill 7 as a declaration of policy by the legislature but, as I see it, House Bill 7 will have no legally binding effect upon any future legislature if it sees fit to act without following the course proposed in bill.

The only sure method which I see of securing a more thorough deliberation and a more representative action on such amendments in future as a matter of law is to amend the state constitution so as to provide that an amendment to the federal constitution when submitted by congress shall be considered by the legislature then in session, if it sees fit to act upon it and after the legislature has acted upon it, the amendment shall be placed upon the ballot at the next state election and an advisory vote of the people taken on the amendment in a manner suggested in House Bill 7 and, after such vote, the matter shall again be considered by the succeeding legislature and acted upon in the light of the information as to public sentiment shown by the popular vote, but that the legislature shall have no authority to ratify an amendment to the federal constitution except by favorable vote of two successive legislatures. By such a plan the public would be informed by the discussion in the legislature before the popular vote was taken and the legislature would be informed by the popular vote before final action.

In considering amendments to the Massachusetts Constitution, we have always required that an amendment should be considered by two successive legislatures. This is still required under the provisions of the I. and R. Amendment. I see no reason why the state should act more hastily on amendments to the federal constitution, which may involve the structure of the nation, than they do on amendments to the state constitution.

While there is considerable doubt whether the provisions of the Referendum, even if applicable to resolves of the legislature ratifying amendments to the federal constitution could be effective under Article V of the federal constitution which provides for ratification by the "legislatures" of three-fourths of the states, and while this question has not yet been decided by the Supreme Court of the United States, there seems to be no such legal objection to the plan suggested above.

I believe it to be within the power of a people of a state to so arrange their legislative processes that the judgment of two successive legislatures should concur in ratifying the federal amendment before they can speak on behalf of the people of the state in their representative capacity.

Yours respectfully,

F. W. G.

DISEMBODIED SPIRITS IN THE LAW.

To the Editor of the Massachusetts Law Quarterly:

In view of the current interest in the subject of spirits and spirit messages, the bar may be interested in the following:

A person came to Chief Justice Holt, declaring himself sent by the Holy Ghost, to bid the chief justice enter a *nolle prosequi* in the case of a prisoner. Holt answered him: "Thou art a lying knave; if the Holy Ghost had sent thee, he would have sent thee to his Majesty's attorney-general and not to me, for the Holy Ghost knows well I have no power to enter a *nolle prosequi.*"

(See Gray, Nature and Sources of the Law, p. 310, Dictionary of National Biography near the end of article on Lord Holt, Campbell's "Lives of the Chief Justices," 2nd Ed., p. 173. The versions differ somewhat in these three books.)

There is a tradition that Jeremiah Mason was once approached by a woman who said she was sent by the Angel Gabriel to tell Mr. Mason that a certain prisoner on trial was innocent. Mr. Mason said, "Did the Angel Gabriel tell you that." "He did." "Then go back home, and the next time you see the Angel Gabriel, say to him from me, 'Prove it.'"

(This anecdote is referred to in Hillard's Memoirs of Mason, but the family tradition as given above puts it in the more picturesque and characteristic form.)

In James B. Thayer's "Legal Essays," p. 325, there is an essay on "Trial by Jury of Things Supernatural" citing *Lyon* v. *Home,* L.R. 6 Eq. 655, and *Dean* v. *Ross,* 178 Mass. 397.

Yours very truly,

A CORRESPONDENT.